(8)

{SHOW } PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-00885 CFX
SHORT TITLE Norfolk & Western Ry. Co. DOCKETED: Dec 3 1984
VERSUS Coal Exporters Assn. of U.S.

Date	Proceedings and Orders
Dec 3 1984	Petition for writ of certiorari filed.
Dec 18 1984	Order extending time to file a consolidated response of Coal Exporters Assn. and Natl. Coal Assn. to the
Dec 18 1984	petition for writ of certiorari in the above-entitled case has been granted, and your time has been extended
Dec 18 1984	for only 15 days from date of receipt of response to be filed by the Solicitor General.
Dec 21 1984	Order extending time to file consolidated response of Patrick W. Simmons to the petition for a writ of
Dec 21 1984	certiorari and to response of S.G. and your time has been extended for only 15 days from date of reciept of
Dec 21 1984	response to be filed by S.G.
Dec 21 1984	Order extending time to file consolidated response of ECTC to the petition for a writ of certiorari and to
Dec 21 1984	response of S.G. and your time has been extended for

CONTINUE {

{SHOW } PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-00885 CFX
SHORT TITLE Norfolk & Western Ry. Co. DOCKETED: Dec 3 1984
VERSUS Coal Exporters Assn. of U.S.

Date	Proceedings and Orders
Dec 21 1984	response of S.G. and your time has been extended for only 15 days from date of receipt of response to be
Dec 21 1984	filed by S.G.
Dec 24 1984	Order extending time to file response to petition until February 1, 1985.
Dec 24 1984	Above extension for the Solicitor General.
Feb 5 1985	Brief of United States in support of petition filed. VIDED.
Feb 12 1985	Order extending time to file response to petition until March 1, 1985.
Feb 12 1985	Above extension is for Coal Exporters Assn., et al.
Feb 13 1985	Order extending time to file response to petition until March 1, 1985.
Feb 13 1985	Above extension is for Patrick W. Simmons.
Mar 1 1985	Brief of respondent Eastern Coal Transportation, et al. in opposition filed. VIDED.
Mar 1 1985	Brief of respondents Coal Exporters Assn., et al. in opposition filed. VIDED.
Mar 5 1985	Reply brief of petitioners Norfolk & Western Ry. Co., et al. filed.
Mar 1 1985	Waiver of right of respondent Patrick W. Simmons to respond filed.
Mar 13 1985	DISTRIBUTED. March 29, 1985
Mar 27 1985	REDISTRIBUTED. April 12, 1985
Apr 15 1985	REDISTRIBUTED. April 19, 1985
Apr 22 1985	REDISTRIBUTED. April 26, 1985
Apr 29 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Rehnquist joins. (Detached opinion.) Justice O'Connor OUT.

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84-885

No. 84-

FILED
DEC 3 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORFOLK AND WESTERN RAILWAY COMPANY,
CHESSIE SYSTEM RAILROADS, and
SEABOARD SYSTEM RAILROAD, INC.,
Petitioners,

v.

COAL EXPORTERS ASSOCIATION OF THE
UNITED STATES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 3, 1984

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QUESTIONS PRESENTED

The exemption provision of the Interstate Commerce Act (49 U.S.C. § 10505) constitutes "an important cornerstone" of the landmark Staggers Rail Act of 1980, which was enacted to eliminate or reduce various aspects of railroad regulation. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980). Section 10505 provides that the Interstate Commerce Commission "shall exempt" transportation service from regulation when it finds that regulation:

> "(1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> "(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power."

In the decision reviewed by the Court of Appeals below, the Commission exercised its deregulatory authority pursuant to this section to exempt from continued regulation railroad movements of coal bound for export. The Commission, based on extensive evidence and findings concerning the competitive forces restraining railroad pricing actions, concluded that regulation was not necessary to carry out the national rail transportation policy, including the policy of maintaining reasonable rail rates, and was not needed to protect shippers from any abuse of market power.

The Court of Appeals set aside the Commission's decision, not because it found the findings to be arbitrary or lacking in evidentiary support, but because the Court concluded that the Commission's findings were legally inadequate in essentially two respects: first, the Commission had not found that the railroads possessed *zero* market power; and second, the Commission had not made detailed "nonconclusory" findings as to what rates would be rea-

sonable"—what are the railroads' revenue needs, what amount of gains they would experience under exemption, what share of any "economic rents" they deserve, and whether the revenues from exempt traffic would "disproportionately subsidize" other traffic—and whether such "reasonable" rates would result from competitive forces following exemption.

The case presents two questions:

1. By dismissing as a matter of law the Commission's critical findings that there would be non-abuse of market power and "reasonable" rail rates after an exemption from regulation due to the relatively equal bargaining power between railroads and export coal shippers, and by ruling instead that the Commission may grant exemptions only after making detailed predictive findings as to the prospective "reasonableness" of rates under deregulation, did the Court of Appeals for the District of Columbia Circuit mandate findings not required by Section 10505, vitiate the exemption provision, and turn the deregulatory intent of Congress on its head?

2. Did the Court of Appeals err in substituting its own judgment for that of the Commission with respect to the accommodation of competing statutory policies embodied in the national rail transportation policy?

PARTIES TO THE PROCEEDINGS

The following parties appeared in the proceedings before the Court of Appeals below:

Norfolk and Western Railway Company
Chessie System Railroads
Seaboard System Railroad, Inc.
The Atchison, Topeka & Santa Fe Railway Company
Burlington Northern Railroad Company
Denver & Rio Grande Western Railway Company
Union Pacific Railroad Company
Utah Railway Company
Coal Exporters Association of the United States, Inc.
National Coal Association
Eastern Coal Transportation Conference
Coastal States Energy Company
Patrick W. Simmons (Illinois Legislative Director of the United Transportation Union)
Nippon Steel Corporation
Kawasaki Steel Corporation
Kobe Steel, Ltd.
Nippon Kohan K. K.
Nisshin Steel Company, Ltd.
Sumitomo Metal Industries, Ltd.
Interstate Commerce Commission
United States of America

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each corporation on whose behalf the instant petition is filed:

Norfolk and Western Railway Company:
Norfolk Southern Corporation
Des Moines Union Railway Company
Fort Wayne Union Railway Company
High Point, Thomasville & Denton Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company
Winston-Salem Southbound Railway Company

Southern Railway Company
Algers, Winslow and Western Railway Company
Augusta and Summerville Rail Road Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
High Point, Randleman, Asheboro and
Southern Railroad Company
Mobile and Birmingham Railroad Company
The North Carolina Midland Railroad Company
The South Western Rail Road Company
State University Railroad Company
Yadkin Railroad Company

Chessie System Railroads:

CSX Corporation
Mid Allegheny Corporation
New Gauley Coal Corporation
Littleton Fuel Company
The Baltimore and Ohio Railroad Company
The Baltimore and Philadelphia Railroad Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Atlanta and West Point Railroad Company
Monon Coal Company, Inc.
Nashville & Decatur Railroad Company
North Charleston Terminal Company
Fruit Growers Express Company
Richmond-Washington Company
Allegheny and Western Railway Corporation
The Baltimore and Cumberland Valley
Railroad Extension Company
The Cincinnati Inter-Terminal Railroad Company
Trailer Train Company
Home Avenue Railroad Company
Richmond, Fredericksburg and Potomac
Railway Company

Seaboard System Railroad, Inc.:

(same as Chessie System Railroads)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

NORFOLK AND WESTERN RAILWAY COMPANY,
CHESSIE SYSTEM RAILROADS, and
SEABOARD SYSTEM RAILROAD, INC.,
Petitioners,

v.

COAL EXPORTERS ASSOCIATION OF THE
UNITED STATES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Norfolk and Western Railway Company, Chessie System Railroads, and Seaboard System Railroad, Inc., respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 18, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (per Judge Wright) is reported at 745 F.2d 76, and appears as Appendix A (App. 1a).[1] The opinion of the Interstate

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[1] Petitioners refer to, and incorporate, the Appendix accompanying the petition for writ of certiorari filed on December 3, 1984, in *Interstate Commerce Commission* v. *Coal Exporters Association of the United States, Inc.*, No. 84- ——. That petition seeks review of the same Court of Appeals judgment that is the subject of the instant petition.

Commerce Commission (the "Commission") is reported at 367 I.C.C. 570, and appears as Appendix C (App. 50a). A subsequent opinion of the Commission, denying a motion for an administrative stay pending judicial review, is unreported, and appears as Appendix D (App. 126a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1984, and appears as Appendix B (App. 48a). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).[2]

STATUTORY PROVISIONS INVOLVED

The statutes principally involved are the exemption provision and other related provisions of the Interstate Commerce Act. 49 U.S.C. §§ 10101a, 10505. These pertinent provisions are set forth in Appendix E (App. 150a). Also involved is the Administrative Procedure Act. 5 U.S.C. §§ 551-706.

STATEMENT OF THE CASE

The Court of Appeals in this case has vitiated a fundamental provision of a landmark railroad deregulation statute. At issue is the construction of the exemption provision of the Interstate Commerce Act, which directs the Commission to exempt rail transportation service from regulation when it finds that regulation (1) is not necessary to carry out the national rail transportation policy

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[2] On November 9, 1984, the Court of Appeals, acting pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, entered an order staying, through and until December 3, 1984, the issuance of its mandate. The instant petition for writ of certiorari is filed during the period of the stay and, under Rule 41(b), the stay shall continue in effect until this Court makes a final disposition of this case.

and (2) is "not needed to protect shippers from the abuse of market power." [3] 49 U.S.C. § 10505.

In the administrative proceeding below, the Commission found that export coal shippers had ample transportation options and alternatives and that, as a result, the bargaining power of railroads and shippers is "relatively equal." 367 I.C.C. at 587 (App. 74a). Accordingly, it found—based on its view of the structure of the coal transportation market—that the rail rates that would result from exemption would remain reasonable, and that the railroads would not be able to "abuse" any market power they might have. 367 I.C.C. at 587, 594 (App. 75a, 85a). The Commission therefore exercised its authority under this provision to grant an exemption from regulation for movements of export coal by rail carriers.

The Court of Appeals did *not* disagree with the Commission's factual findings, or conclude that they were unsupported by substantial evidence. Instead, it concluded that those findings were *legally inadequate*—first, because the Commission had not found that the railroads would have *no* market power (App. 28a, 31a), and, second, because the Commission did not make detailed predictive findings with respect to the "reasonableness" of the rates and the precise distribution between railroads and shippers of any "economic rents" [4] that would result following an exemption from regulation (App. 43a-45a, 46a). Because it concluded that the Commission had

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[3] Because the Commission found that regulation of export coal rail traffic was not needed to protect shippers from the abuse of market power, it had no occasion to consider whether export coal traffic was a service of "limited scope" under the alternative standard of the exemption provision. 367 I.C.C. at 586 n.37 (App. 73a).

[4] "Economic rents," as the Commission explained, are the difference between the world market price of coal and the costs (including a reasonable return on investment) of producing and transporting that coal. 367 I.C.C. at 592 (App. 83a).

failed to make either of these additional findings, the Court of Appeals set aside the exemption decision.

Congress granted the Commission the exemption authority as "an important cornerstone" [5] of the strong deregulatory policy embodied in two recent statutes that have transformed the Commission's traditional role as regulator of rail rates: the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"),[6] and the Staggers Rail Act of 1980.[7] To understand the purpose of the exemption provision and the nature of the Commission's decision in this case, a brief review of the statutory framework is necessary.

A. Congress' Deregulation of the Railroad Industry in 1976 and 1980

The reasonableness of prices may be assured in basically one of two ways: regulation, or reliance on the market. The regulatory method typically involves determination by some government agency of a "reasonable" rate in light of the cost of service, the value of or demand for service, the revenue needs of the party performing the service, the profit in fact achieved, the efficiency of the performing party, and other related factors. The market approach focuses upon the structure of the market; if that structure is effectively competitive, and if no party can abuse whatever market power it may have, then reasonable prices are assumed to result from the bargaining that takes place in the market, and further elaborate regulatory inquiry is deemed unnecessary.

Traditionally, the reasonableness of railroad rates in the United States has been determined through regulation by the Interstate Commerce Commission and, to some ex-

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[5] H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980).

[6] Pub. L. No. 94-210, 90 Stat. 31 (1976).

[7] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

tent, the State regulatory commissions. Prior to 1976, the Commission was charged with the general regulation of all railroad rates under a broad "just and reasonable" standard.[8] Rail carriers were required to reflect their rates in published tariffs and to charge shippers in strict accordance with such tariffs. The reasonableness of rail rates was subject to Commission review on the complaint of a shipper or on the Commission's own initiative. The Commission possessed the authority to determine and to prescribe for the future a "just and reasonable" rate.

In 1976, Congress radically changed this regulatory structure. Faced with mounting evidence that railroads were now constrained by vigorous competitive market forces and that existing regulation had both impeded the railroads' ability to compete and prevented them from generating sufficient revenues to sustain the nation's rail system, Congress determined that a significant relaxation of Federal regulation was essential. In the 4-R Act, Congress sharply curtailed the Commission's regulation of rail rates by providing that the Commission could review the maximum reasonableness of a challenged rail rate only after making a threshold determination that the rail carrier in question has "market dominance" over the specific traffic to which the challenged rate applies. 49 U.S.C. § 10709(b).[9] "Market dominance," in turn, is defined as the "absence of effective competition from

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[8] *See* Interstate Commerce Act, ch. 104, §§ 1, 15, 24 Stat. 379, 384 (1887).

[9] All references, unless otherwise noted, are to the Interstate Commerce Act as presently codified. That Act, including the amendments introduced by the 4-R Act, was recodified without substantive change in 1978. Pub. L. No. 95-473, 92 Stat. 1337 (1978). The Act was further amended by the Staggers Act which, however, did not alter the substance of the statutory definition of "market dominance." *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 89 (1980).

other carriers to which a rate applies." 49 U.S.C. § 10709 (a). Thus, absent a finding of "market dominance," the Commission is without authority to examine the maximum reasonableness of, or to prescribe, a particular rail rate.

Dissatisfied with the progress and pace of deregulation under the 4-R Act, Congress in the Staggers Rail Act of 1980 made further fundamental changes in the Interstate Commerce Act—all designed to eliminate or reduce various aspects of railroad regulation. Among other things, the Staggers Act introduced further deregulation of rail rates in an effort to restore the financial health of the rail industry and to allow market forces to establish reasonable rates. The Staggers Act retained the substance of the statutory definition of "market dominance" but further circumscribed the Commission's authority to find "market dominance" by establishing a statutory presumption that a rail carrier is not market dominant unless its challenged rate yields a revenue-to-variable cost ratio above a specified figure. 49 U.S.C. § 10709(d).[10] Although railroads are still required to file tariffs and are subject to complaints (with respect to rate increases and new rates), their rates may not be declared unreasonable or unlawful unless the Commission first finds "market dominance," or the absence of "effective competition."

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[10] The Staggers Act made other deregulatory changes in the rate provisions of the Act. It authorized rail carriers to enter into contracts with shippers for the provision of specified services under specified rates and conditions; once a contract rate is in effect, it is no longer subject to regulation. 49 U.S.C. § 10713. In addition, the Staggers Act substantially reduced the ability of railroads to make and adjust rates collectively through rate bureaus. 49 U.S.C. § 10706. The Act further provided for a zone of rate flexibility for rail rate increases. 49 U.S.C. § 10707a. Finally, the Staggers Act provided a cutoff date for challenges even to market dominant rates. After this cutoff date, existing rates became immunized from challenge and only adjustments to these rates are subject to regulatory scrutiny. 49 U.S.C. § 10101a note (savings provisions).

Section 10505—the exemption provision—is an integral part of this statutory framework and the pronounced deregulatory policy underlying it. The exemption provision *complements* the "market dominance" provisions of Section 10709. Under Section 10709, rates continue to be regulated: railroads must continue to file tariffs; and if a shipper believes that a particular rate (or rate increase) is excessive, it may complain—and the Commission will first inquire whether the railroad, in the particular circumstances of the case, faces "effective competition" for the traffic to which the challenged rate applies. If a railroad is found to possess "market dominance," the Commission then proceeds to its regulatory review of the "reasonableness" of the rate.

Under the exemption provision, by contrast, the Commission is *not* required to act on a case-by-case basis after detailed analysis of the circumstances of particular shippers and railroads. Instead, based on its assessment of the characteristics of the market, the Commission may exempt a broad category of transportation services from the requirements of the Act—thereby making it unnecessary for the involved carriers to file tariffs, or to defend their rates by showing an absence of "market dominance" or the "reasonableness" of their rates under established regulatory standards. Congress specifically gave to the Commission the authority to deal with any particular abuses that may arise on an after-the-fact basis once an exemption from regulation is granted. 49 U.S.C. § 10505(d).

Congress clearly intended to confer on the Commission very broad discretion to eliminate all unnecessary regulation.[11] The Commission is "charged with the responsi-

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[11] The exemption provision was first enacted as part of the 4-R Act. Pub. L. No. 94-210, § 207, 90 Stat. 42 (1976). Although initially restricted to exemptions of "limited scope," the provision reflected Congress' firm belief that the Commission should have "considerable flexibility to try innovative, experimental programs

bility of *actively pursuing exemptions* for the transportation and service that comply with the section's standards," H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980), and is instructed to exercise its exemption authority to remove "*as many as possible* of the Commission's restrictions on changes in prices and services by rail carriers . . . ," H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (emphasis supplied). The Commission was further directed by Congress to remove existing regulation and to "adopt a policy of reviewing carrier actions *after the fact to correct abuses of market power.*" *Id.* (emphasis supplied). The exemption provision thus authorizes—indeed, commands—the Commission to go *beyond* the other deregulatory reforms introduced by the 4-R Act and the Staggers Act and to grant exemptions from continued regulation where, based on its assessment of the structure of the market, such regulation is no longer needed.

B. The Commission's Decision

This case began in March of 1981 when the Norfolk and Western Railway Company petitioned the Commission to exempt from regulation export coal traffic mov-

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to determine exactly what kind of less stringent regulation [would] work." H.R. Rep. No. 725, 94th Cong., 1st Sess. 243 (1976).

As "an important cornerstone" of the Staggers Act, H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980), Congress in 1980 substantially *broadened* the exemption provision. No longer restricted to exemptions of "limited scope," the provision now contains a positive command to the Commission to grant exemptions from regulation whenever regulation (1) "is not necessary to carry out the transportation policy of section 10101a of this title," and (2) "is not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505. The provision thus requires the Commission to consider the national rail transportation policy, a statutory list of 15 broad, and sometimes competing, policy considerations, including the policy "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." 49 U.S.C. § 10101a(6).

ing by rail through Atlantic and Gulf ports. The Commission, proceeding under informal rulemaking procedures, responded to the petition by issuing a notice of proposed exemption, which solicited public comment on the partial or complete exemption of all export coal rail traffic. The proposal attracted wide public comment from railroads, coal shippers, governmental entities and other.[12] The proceeding generated a voluminous written record.[13]

The railroad proponents submitted extensive evidence in support of the export coal exemption. This evidence demonstrated that rail carriers did *not* possess significant market power over export coal traffic because of the competitive nature of the world market for coal and because of the transportation alternatives and bargaining leverage available to coal producers and transshippers in their dealings with the railroads. The evidence showed that the export coal market is dominated by giant coal producers and transshippers, which produce and ship coal from a variety of mines located on more than one railroad—mines often served not only by rail but also by truck and/or barge carriers. As a result of their size and competitive options, export coal producers and transshippers enjoy very substantial bargaining leverage in dealing with the railroads, which therefore cannot generally exercise, much less "abuse," any significant degree of market power. As a result of this shipper bargaining leverage, in the period from 1969 to 1981, coal prices had increased faster than rail rates for hauling coal; and, until 1981 (when the exemption case commenced), no export coal shipper had filed any complaints with the

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[12] Four executive departments of the United States (the Departments of Commerce, Justice, State and Transportation) participated in the Commission proceedings and filed written comments.

[13] The written record contains verified statements from over 25 witnesses, including distinguished economists and transportation experts. The joint appendix in the Court of Appeals alone contains over 4000 pages from the administrative record.

Commission attacking export coal rates. In response to contentions that U.S. coal exports would be adversely affected by an exemption, the railroads also submitted evidence showing that, even if in some instance particular rail carriers enjoyed some market power over coal shippers, they would have no incentive to raise rail rates to the point where U.S. export coal production would decline, but rather would differentiate their rates to keep as many mines as possible in the market and to maintain total coal production and export volumes. The shipper opponents of the exemption introduced testimony seeking to rebut the railroads' evidence on all of these points.

On June 9, 1983, the Commission announced and released its final decision granting the export coal exemption. *Railroad Exemption—Export Coal*, 367 I.C.C. 570 (1983) (App. 50a). The Commission made the requisite statutory findings that the regulation of export coal traffic was not necessary to carry out the rail transportation policy and was not necessary to protect shippers from the abuse of market power. 367 I.C.C. at 599 (App. 92a). Accordingly, the Commission exempted all export coal traffic moving by rail through U.S. ports. The key to the Commission's decision was its conclusion that, due to the existence of a variety of vigorous competitive forces, railroads and coal shippers would have "relatively equal bargaining power," 367 I.C.C. at 587 (App. 74a), and that, accordingly, rail carriers could not "abuse" any market power to the detriment of coal shippers and export coal rail rates would remain reasonable.

The Commission first looked at the world market for coal. The Commission found that this market was characterized by "intense" and "[r]igorous" competition. 367 I.C.C. at 572, 576 (App. 53a, 59a). This competition sets a ceiling on the net delivered price of American coal sold abroad (that is, the cost of mining and transporting the coal). Any increase in rail rates that causes the net

delivered price of coal to rise above the established market price will result in a loss of business and coal exports as foreign buyers of coal look to other suppliers. 367 I.C.C. at 571-76, 592-93 (App. 52a-59a, 83a). Thus, the Commission found, the existence of strong worldwide competition effectively restrains the pricing actions of both coal exporters and rail carriers. 367 I.C.C. at 571, 592 (App. 52a, 82a).

The Commission did not, however, rest solely on the forces of world competition to protect shippers from an abuse of market power by railroads. For the existence of a ceiling on the net delivered price of American coal does not determine how the revenue or any "economic rents," from export coal are to be shared among railroads and the shippers they serve. Those rents are divided between railroads and coal shippers as they negotiate over the level of rail rates for specific coal movements. If a rail carrier enjoys greater bargaining power than a shipper, the railroad may be able to appropriate a greater share of the rents in the form of higher rail rates. Conversely, where the coal shipper enjoys bargaining leverage over a rail carrier, the shipper can be expected to capture a larger share of the rents. 367 I.C.C. at 595 & n.67 (App. 86a). The amount of bargaining power depends on the availability of alternatives and competitive options to shippers and railroads. The Commission found as a matter of fact that a variety of competitive factors insure that railroads and shippers enjoy "relatively equal bargaining power" and that, as a result, neither party would be able to capture all or a disproportionate share of any economic rents. 367 I.C.C. at 587 (App. 74a).[14] Thus, because of these competitive factors, rail rates would remain reasonable and ship-

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[14] In fact, the Commission found that railroads often had fewer alternatives than shippers because they depend so greatly on "increasing volumes of export coal to amortize their heavy investment and finance new construction." 367 I.C.C. at 593 (App. 84a).

pers would have sufficient bargaining leverage to prevent unreasonable pricing by railroads. 367 I.C.C. at 593 (App. 84a). These competitive forces derive from several sources.

First, the Commission relied on evidence of significant intramodal competition, or competition among railroads for export coal traffic. This competition exists, the Commission found, in large measure because most export coal purchases are arranged by large coal producers who own coal located on more than one railroad, or by transshippers, who purchase coal from mines located on more than one railroad. 367 I.C.C. at 571 (App. 52a). Because these large producers and transshippers are able to fill their orders from a variety of mines served by different railroads, they have substantial bargaining power vis-a-vis any one railroad. Any attempt by a railroad to charge an excessive rate would result in the producer or transshipper turning to mines located on a different railroad, thus depriving the first railroad of the business. This ability to choose among railroads confers substantial bargaining leverage on shippers, who can thus restrain railroads from charging excessive rates. 367 I.C.C. at 571-72, 578, 593-94 (App. 52a-53a, 61a, 84a-85a).

Second, the Commission found that railroad rates for export coal were also restrained by intermodal competition. 367 I.C.C. at 578, 594 (App. 61a-62a, 85a). Both existing and potential competition from trucks, barges and pipelines provide coal shippers with transportation alternatives, and thus prevent the railroads from successfully exacting high or abusive rail rates.

Third, the Commission concluded that geographic competition, or competition among carriers delivering coal for export from different regions of the country, provided a further check on railroad market power. 367 I.C.C. at 578-79, 594 (App. 62a-63a, 85a). Indeed, the Commis-

sion described such competition as "severe." 367 I.C.C. at 594 (App. 85a).[15]

As a result of all of these competitive factors, the Commission concluded that, following exemption, the bargaining power of railroads and shippers would be "relatively equal," that the railroads would not be able to appropriate all or even a disproportionate share of any economic rents, and that the forces of the market would establish reasonable and rational rates for export coal traffic. 367 I.C.C. at 587 (App. 75a). *See also* 367 I.C.C. at 578, 580, 582, 593, 594 (App. 61a, 64a, 67a-68a, 84a). Thus, railroads could not "abuse" market power. 367 I.C.C. at 594 (App. 85a).[16]

In granting the export coal exemption, the Commission also relied on two non-market checks on railroad market abuse: the existence of antitrust remedies for abusive or monopolistic practices and the threat of Commission revocation of the exemption should rail carriers fail to act reasonably. 367 I.C.C. at 595 (App. 87a). The Commission determined that these "important safeguards"

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[15] The Commission identified two other competitive restraints as well. First, it found that product competition, or competition among carriers for the movement of products that are substitutes for coal, was an "important factor." 367 I.C.C. at 594 (App. 85a). Second, the Commission found that coal producers can exert bargaining leverage by selling in the regulated domestic coal market. 367 I.C.C. at 594 & n.64 (App. 85a).

[16] The Commission buttressed its conclusions that railroads could not abuse market power and that shippers enjoyed "substantial bargaining power" by referring to the historic record of railroad export coal pricing behavior. 367 I.C.C. at 580-81 (App. 64a-65a). The Commission noted that the fact that no maximum rate complaints concerning export coal had ever been filed before 1981 was powerful evidence that rail rates had been constrained by competitive market forces. In addition, the fact that coal prices had over time increased faster than export coal rail rates suggested that shippers of export coal enjoyed "considerable economic bargaining power in the contest over division of the economic rents from export coal." *Id.*

would protect against any abuse of market power by railroads "even if a particular railroad were to develop sufficient leverage to be able to do so." 367 I.C.C. at 595-96 (App. 87a).

With respect to contentions that U.S. coal exports would be adversely affected by the exemption, the Commission relied on its principal findings that railroads and shippers enjoyed "relatively equal bargaining power" and that railroads would not be able, following exemption, to abuse any market power by exacting unreasonably high rail rates from coal shippers. However, the Commission added that, *even if* the railroads in some "rare instance" might enjoy some bargaining advantage over producers or transshippers, 367 I.C.C. at 594 (App. 85a), such railroads would not set their rates at levels that would result in a reduction of U.S. coal exports because, in that event, the railroads would have every incentive to differentiate their rates and maximize revenue at a competitive level of output. 367 I.C.C. at 581-82, 592-95 (App. 66a-67a, 83a-87a).

The Commission thus concluded in this case that, based on extensive evidence of competitive alternatives and non-market restraints on railroad pricing actions, continued regulation of export coal traffic was not needed to protect shippers from an abuse of market power or to maintain reasonable rail rates. The Commission also found that the exemption would "actively further" several important elements of the national rail policy by allowing rail carriers to respond quickly and flexibly to changes in the dynamic world market, by facilitating the use of efficient long-term rail contracts, and by assisting the railroads to earn adequate revenues. 367 I.C.C. at 586-92, 596 (App. 73a-82a, 88a).

C. The Court of Appeals' Decision

The Court of Appeals, on review of the Commission's exemption decision, expressly *declined* to disturb any of

the agency's factual findings, including its fundamental findings concerning the extensive competitive restraints on railroad pricing actions and the "relatively equal bargaining power" of railroads and shippers (App. 27a, 45a). However, the Court of Appeals vacated the exemption decision because, in its view, these findings failed, as a matter of law, to meet the requirements of Section 10505. The Court of Appeals reached this result by construing the exemption provision to require that the Commission undertake essentially the same regulatory inquiry, and make essentially the same regulatory findings, that would be required in individual rate cases.[17]

First, the Court of Appeals ruled that the Commission could have satisfied the exemption standard by finding that railroads possessed *zero* "market power" with respect to export coal traffic and therefore were constrained by "effective competition" (App. 28a). Such a finding would have required the Commission to make the same kind of individualized, "relatively specific inquiries" that would be necessary to prove "effective competition" in an individual rate case, where "market dominance" is at issue (App. 28a, 31a-32a n.20, 35a-36a n.21).

In the present case, the Court of Appeals pointed out that the Commission had not made an explicit finding of total absence of "market power" (App. 28a). The Court concluded that the Commission's extensive competition findings were insufficient to establish "effective competition" because they were not sufficiently specific or individualized (App. 31a-32a n.20). In addition, the Court of Appeals declared that the Commission's discussion of price discrimination negated the existence of "effective competition" and total absence of "market power" because

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[17] The Court of Appeals entirely ignored the Commission's reliance on non-market safeguards against abuse of market power by railroads, including antitrust remedies and the threat of revocation of the exemption.

price discrimination assumes the existence of some degree of market power.[18] Accordingly, despite the Commission's "repeated reference" to its findings concerning competition, and the Court of Appeals' decision not to disturb those findings, the Court disregarded them because it concluded they were of "minimal" legal importance (App. 46a).

Second, the Court of Appeals ruled that, even in the absence of a finding of "effective competition," the Commission could lawfully have granted the exemption—but only if it *first* made specific findings concerning (1) what rates and what division of any economic rents would be "reasonable," (2) the amount of competition that would exist under the exemption, and (3) whether the amount of competition existing after the exemption would produce such "reasonable" rates. Thus, the Court concluded that the exemption provision "includes within it" regulatory policy as to "reasonable" rates (App. 39a), that the exemption provision should "reflect the policies of the statutory [regulatory] scheme of which they are a part" (App. 44a), and that this regulatory scheme required consideration of such factors as "the actual revenue needs of the carriers involved," "the size of the revenue gains they would likely receive from the exemption," and "the degree to which needed revenue gains would be disproportionately subsidized by one group" (App. 45a). The central point of the Court of Appeals' decision was its conclusion that the exemption provision obligates the Commission in such cases to determine in "non-conclusory

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[18] In this respect the Court of Appeals ignored the Commission's clear finding that railroads and shippers have "relatively equal barbaining power." 367 I.C.C. at 587 (App. 74a). In any event, as noted above, *see* pages 10, 14, *supra*, the purpose of the Commission's discussion of price differentiation was to show that, *even if* some railroads might have some degree of market power, they would not "abuse" such power by increasing rates to the point where total export coal production would fall.

terms" what a "reasonable" rate would be following exemption, and whether and how much competition would be sufficient to produce such "reasonable" rates (App. 46a).

The Court of Appeals ruled in this case that the Commission had failed to make the detailed findings necessary to satisfy this standard for granting an exemption from regulation. According to the Court of Appeals, the Commission never undertook to determine in "nonconclusory terms" what rates would result from the exemption, or to explain why such rates would be reasonable, or to predict the precise revenue impact of the exemption (App. 44a, 46a). Rather, the Commission relied on the existence of competitive forces and the "relatively equal bargaining power" of railroads and shippers to establish what the Court of Appeals termed an "undisclosed balance" in the establishment of rail rates and the division of economic rents (App. 46a).

In sum, the Court of Appeals interpreted the exemption provision to require highly specific, before-the-fact predictive findings that mirror the two regulatory phases of an individual rate reasonableness case. In the Court's view, the Commission in exercising its exemption authority must find *either* that there is *no* "market power" and, therefore, "effective competition," *or* it must go on and find that the rates resulting from the exemption will be "reasonable" in light of existing regulatory rate standards.

REASONS FOR GRANTING THE WRIT

In the last decade, Congress has deregulated major industries. The Staggers Rail Act of 1980 was the most significant effort by Congress to deregulate the rail industry, and the exemption provision at issue in this case was strengthened in a crucially important portion of that statute. This Court has not yet construed a single provision of the Staggers Act. Such construction is now necessary.

This case warrants plenary review because it presents substantial federal questions. Judge Wright's decision for the Court of Appeals willfully resists the deregulation agenda established by Congress and unlawfully vitiates the critical exemption provision. The Court of Appeals adopted a construction of Section 10505 that is inconsistent with its plain language, wholly at odds with its legislative history and expressed purposes, and contrary to the decisions of other appellate courts that have interpreted it. In addition, the Court of Appeals invaded the province of the Commission by imposing its own views as to the proper balance to be struck among the often competing policy objectives reflected in the exemption standard.

This Court should review the decision below in order to give effect to the deregulatory intent of Congress, to restore the proper scope of the exemption provision in relation to existing statutory provisions governing regulation of rail rates, and to correct the Court of Appeals' transgression of the respective roles of reviewing court and expert agency in implementing a broad Congressional delegation of authority to deregulate the railroad industry.

I. THE COURT OF APPEALS HAS DEMONSTRABLY VITIATED THE EXEMPTION PROVISION OF THE INTERSTATE COMMERCE ACT BY MANDATING DETAILED PREDICTIVE FINDINGS THAT ARE NOT REQUIRED, THEREBY DIRECTLY VIOLATING THE CONGRESSIONAL DEREGULATORY PURPOSE EMBODIED IN THE EXEMPTION PROVISION.

The Court of Appeals in the decision below interpreted the exemption provision in a manner that is contrary to its plain language and sharply at odds with Congress' deregulatory purpose. The Court's decision cripples the Commission in carrying out Congress' command—embodied in the exemption provision—to aggressively pursue the elimination of regulatory restrictions not necessary to protect shippers from any abuse of market power.

The Commission rested its decision in this case on the crucial finding, amply supported by the evidence and *undisturbed* by the Court of Appeals, that various competitive factors and transportation alternatives available to coal shippers combined to insure that railroads and shippers enjoy "relatively equal bargaining power" over the negotiation of rail rates for export coal. 367 I.C.C. at 587 (App. 74a). Because of this equality of bargaining power, and because of the additional non-market constraints, the Commission found that railroads could not "abuse" any market power they might have and that the rail rates resulting from the negotiations between rail carriers and shippers under the exemption would therefore be reasonable and represent a fair distribution of any economic rents. 367 I.C.C. at 587 (App. 74a-75a). In reaching this conclusion, the Commission did not engage in the elaborate, detailed line-drawing that would be required in regulating particular maximum rates; thus, it did not decide whether specific carriers were "market dominant" as to particular transportation services, nor did it try to predict with specificity the level of particular export coal rates following the exemption or to determine their "reasonableness," as it would do in regulating individual rates. Rather, the Commission looked to general market structure, including evidence of competitive forces and transportation options and alternatives available in the market, as the determining factors in the exemption decision.

(1) The Court of Appeals' decision erroneously holds that such findings with respect to general market structure and competitive alternatives are inadequate as a matter of law to support an exemption. It committed further error by holding that the Commission must make individualized, detailed findings either that rail carriers have no market power (App. 28a) or, alternatively, that the specific rates resulting from the competitive forces operating after exemption would be "reasonable" under

regulatory standards (App. 46a). Such findings are simply *not* required by the exemption provision of the Act. Section 10505 requires a finding that regulation is not needed to protect shippers from an "abuse" of market power—not that *no* market power exists. Once the required finding that regulation is not necessary to prevent "abuse" is made, Section 10505 does not require further findings predicting the rates which will result from exemption and assessing their consistency with regulatory standards of reasonableness.

(2) The Court of Appeals' decision is fundamentally contrary to the Congressional purpose underlying the exemption provision. Congress clearly expected that the exemption authority would be exercised in connection with broad categories or classes of traffic[19]—that is, the Commission would go beyond those specific movements already partially deregulated by virtue of the "market dominance" provision and other provisions of the Act. The Commission was instructed to "pursue partial or complete exemptions from remaining regulation." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). In removing "as many as possible" of existing regulatory restrictions on rail carriers,[20] the Commission was authorized to try "innovative," indeed "experimental" programs of deregulation,[21] and to review carrier action "after the fact" to correct any abuses of market power that might develop as a result of the exemption.[22] Thus, the exemption provision embodies a strong presumption in favor of deregulation.

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[19] Thus, Congress in 1980 amended the exemption provision to remove the requirement that exemptions be of "limited scope." *See* page 7, *supra*.

[20] *Id.* at 105.

[21] H.R. Rep. No. 725, 94th Cong., 1st Sess. 243 (1976).

[22] H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980).

At the heart of this presumption in favor of deregulation and the emphasis on "after the fact" review of specific carrier practices is a judgment by Congress that where the existing market structure is such that railroads cannot be expected to abuse market power, the Commission should grant an exemption and get out of the business of regulating the "reasonableness" of specific railroad rates. Indeed, the very purpose of an exemption from regulation for a broad class of traffic was to *relieve* the Commission of the responsibility and administrative burden of determining which specific rail carriers possess "market dominance" and whether particular challenged rates are "reasonable" as measured against prevailing regulatory standards. If any problems developed following exemption, they could be dealt with "after the fact" by the Commission, or by pursuing other federal remedies such as the antitrust laws.

The Court of Appeals, by mandating detailed predictive findings as to what rates would be reasonable and whether such rates would result from competition in a deregulated environment, subverts this basic purpose of the exemption. In effect, the Court of Appeals rejects the fundamental Congressional premise of deregulation—the belief that the structure of the market involved (in this case transportation of coal for export) may be sufficiently competitive that shippers *do not need* regulatory protection from abuse, and that the kinds of detailed regulatory inquiry into "market dominance" or rate "reasonableness" that were formerly required as to regulated rail traffic *are no longer necessary*. By requiring such an inquiry in an exemption proceeding, the Court of Appeals effectively nullifies Congress' intent in enacting the exemption provision to authorize broad exemptions from regulation. Further, the Court of Appeals' interpretation of the exemption provision would defeat Congress' declared intent to rely on "after the fact" review of specific carrier practices as a principal check on railroad abuse of market power. In essence, the Court of Appeals reversed the strong pre-

sumption in favor of deregulation by effectively reintroducing the regime of Commission rate regulation *as a prerequisite* to exemption from that very regulation. The Court's decision is therefore flatly contrary to—and directly undermines—the broad deregulatory purpose of the exemption provision.

(3) Moreover, by requiring the Commission in an exemption proceeding to make determinations as to the presence of "effective competition" and the "reasonableness" of rail rates, the Court of Appeals would render the exemption provision essentially superfluous. Under the Court's decision, the Commission would only be able to exempt traffic from regulation by making the kinds of regulatory findings that would result in rate approval in the absence of an exemption. The legislative history of the exemption provision makes it clear that such a result was not intended by Congress. The Staggers Act Conference Report, which recommended the exemption provision in its present form, declared unambiguously that the section "permits exemptions wherever regulation is not needed to prevent abuses of market power, *regardless of the presence of effective competition.*" H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (emphasis supplied).[23] Thus, Congress made it clear that, in adopting an "abuse of market power" standard, it did not intend to incorporate the same kind of threshold determination of "effective competition" or "market dominance" that would be required in individual rate cases.[24] The Court of Appeals openly flouted this clear expression of legislative intent

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[23] Indeed, even the exemption provision enacted by the House, where the "effective competition" language originated, would have authorized exemptions in the absence of "effective competition." *See id.* at 104.

[24] The Fifth Circuit, in *American Trucking Associations, Inc.* v. *ICC*, 656 F.2d 1115, 1125-1126 & n.18 (5th Cir. 1981), also relied on this statement from the Conference Report and reached this same conclusion. The Court of Appeals below did not acknowledge the Fifth Circuit's opinion on this point.

by engrafting onto the exemption provision the same threshold standard of "effective competition" that Congress expressly said was not required.

The Court of Appeals committed further error by requiring the Commission, when it finds an absence of "effective competition," to determine whether the rates resulting from exemption would be "reasonable." [25] Thus, the Court's decision not only mandates the threshold inquiry that Congress declined to require, but it also turns the exemption proceeding into essentially the same kind of detailed rate reasonableness inquiry that would be necessary in individual rate cases in the absence of an exemption.

(4) Finally, the Court of Appeals' decision in this case is in conflict with both of the appellate decisions that have reviewed Commission exemptions from railroad rate regulation. In neither case did the Commission or the reviewing courts conclude, as the Court of Appeals did here, that the exemption provision requires the Commission to find either the presence of "effective competition" or that the specific rail rates resulting from the exemption would meet regulatory standards of rate reasonableness. Thus, in *American Trucking Associations*, *supra*, the Fifth Circuit affirmed the Commission's exemption of railroad trailer-on-flatcar traffic, holding that the Commission's findings with respect to general market structure (falling

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[25] The Court's decision suggests that the Commission would have to consider in an exemption proceeding such regulatory criteria as "the actual revenue needs of the carriers involved," "the size of the revenue gains they would likely receive from the exemption," and "the degree to which needed revenue gains would be disproportionately subsidized by one group" (App. 45a).

Such an inquiry in an exemption case would closely parallel the regulatory inquiry in a rate "reasonableness" case, in which the Commission considers the revenue needs of the rail carrier and the profit earned from the rate in question, 49 U.S.C. § 10701a(b), and also considers whether the rate may disproportionately subsidize other rail traffic, 49 U.S.C. § 10707a(e).

far short of an individualized showing of "effective competition") and reliance on antitrust remedies and "after the fact" review were sufficient to satisfy the exemption statute. And in *Brae Corp.* v. *United States*, 740 F.2d 1023, 1039-40 (D.C. Cir. 1984), the D.C. Circuit held that the Commission lawfully exercised its exemption power when it exempted boxcar traffic from maximum rate regulation on the basis of general market constraints —constraints which were acknowledged not to be applicable to all railroads and shippers involved in the exempted traffic.[26] In both cases, therefore, the Commission was permitted, consistent with the policy of the exemption authority—and consistent with the Commission's decision in the instant case—to grant exemptions from regulation on the basis of general market structure, without inquiring into the reasonableness of specific rail rates resulting from the exemption. These decisions thus are in plain and obvious conflict with the stringent findings and standard imposed by the Court of Appeals below.

In sum, the Court of Appeals' decision in this case raises important questions concerning the interplay between the exemption provision and the maximum rate provisions of the Interstate Commerce Act. The Court of Appeals has erroneously required regulatory scrutiny of railroad rates in construing the exemption provision. This purported accommodation of the rate regulatory provisions and the exemption provision effectively emasculates the exemption provision. This Court should grant the requested writ to correct this serious error and to restore the exemption authority to its intended place in the statutory structure of recent railroad deregulation statutes.

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[26] In *Brae Corp.*, the Court of Appeals' discussion of general market constraints was made in connection with its affirmance of the Commission's exemption of boxcar traffic from maximum rate regulation. The Commission has petitioned this Court to review a *different* portion of the Court of Appeals' decision, which reversed the exemption decision insofar as it related to the so-called car hire rules governing boxcar movements. *See ICC* v. *Brae Corp.*, No. 84-550.

II. THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE COMMISSION WITH RESPECT TO THE ACCOMMODATION OF COMPETING STATUTORY POLICIES.

This Court should grant the writ and review the judgment of the Court of Appeals for another reason. The decision of the Court of Appeals misconceives the proper role of a reviewing court and represents an improper invasion of the broad policymaking authority explicitly conferred on the Commission by Congress in the exemption provision. Notwithstanding its purported application of a narrow standard of judicial review, the Court of Appeals reached its result only by injecting its own views as to the proper balance to be struck among the competing policy objectives set forth in the national rail transportation policy. Because the Court of Appeals' actions represent a serious transgression of the proper bounds of judicial review as articulated by this Court and, in the process, subverts the Commission's ability to implement its exemption authority as Congress intended, this Court should grant review.

As an exercise of informal rulemaking authority, the Commission's export coal exemption decision could be set aside by the Court of Appeals only if that decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although agency discretion is not unlimited, judicial review of agency action under this standard is, under settled and familiar principles, both very narrow in scope and highly deferential to the expert judgment of the agency.[27]

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[27] The reviewing court is not empowered to substitute its judgment for that of the agency. *See, e.g., Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2866 (1983); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

Rather, the court's limited function is to determine whether the agency's decision was based on a consideration of the relevant

This Court has determined that judicial deference to an agency's decision is especially appropriate when that decision rests on judgments of policy. A "rational weighing of competing policies" [28] by the agency is entitled to respect by the courts, even where such policy judgments are based on an interpretation of the agency's governing statutes. *See, e.g., Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2781-83 (1984). Moreover, an agency's attempt to predict the effects of its actions is similarly entitled to judicial deference. "In such cases complete factual support for the Commission's ultimate conclusions is not required since 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " [29]

The authority to exempt classes of rail traffic from regulation was granted to the Commission along with an affirmative command by Congress to deregulate rail transportation whenever continued regulation is not necessary to protect shippers from the abuse of market power. The legislative history makes clear that Congress believed that the Commission should be entrusted with the important task of deciding the nature and scope of further deregulation:

> "The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, *the Commission is more capable* through the administrative process of examining specific regula-

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factors and whether the agency articulated a rational connection between the facts found and the choice made. *Motor Vehicle Manufacturers, supra*, 103 S. Ct. at 2866-67; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962).

[28] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

[29] *Id.* at 595 (quoting *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978)).

> tory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." (Emphasis supplied).

H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). In addition, the legislative history demonstrates that Congress understood the exemption authority to entail a significant element of policymaking, as it authorizes the Commission "to try innovative,, experimental programs to determine exactly what kind of less stringent regulation may work." H.R. Rep. No. 725, 94th Cong., 1st Sess. 243 (1976). Congress further directed the Commission in exercising its exemption authority to review carrier action "after the fact" to correct any perceived abuses of market power. H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). Thus, the entire exemption provision is founded on the assumption that the Commission—the agency having expertise in the area of rail regulation—is most capable of defining the appropriate scope of deregulation and that the Commission is in the best position to review its actions and correct unanticipated market abuse. Until the present case, reviewing courts had respected this institutional role of the Commission.[30]

The Court of Appeals, while paying lip service to the Commission's "very broad authority" under the exemption provision (App. 10a), in fact intruded on the Commission's statutorily delegated authority to determine the nature and scope of deregulation under the exemption provision. The Court of Appeals exceeded its proper function by undertaking itself to accommodate the competing statutory policies reflected in the exemption provision and in the Staggers Act generally—an accommodation that Congress entrusted to the Commission and not to reviewing courts. As the Court of Appeals recognized,

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[30] *See, e.g., American Trucking Associations, supra,* 656 F.2d at 1127 (referring to "broad discretionary power" of the Commission under the exemption provision).

the Staggers Act was in part an attempt to balance the conflicting interests of railroads and shippers (App. 8a-10a n.6). This balance is reflected in the national rail transportation policy itself, which contains competing statutory objectives, ranging from the minimization of Federal rail regulation and promotion of competition to the achievement of railroad revenue adequacy to the assurance of reasonable rail rates for shippers. 49 U.S.C. §§ 10101a(1), 10101a(2), 10101a(3), 10101a(6). By incorporating these diffuse policies into the exemption standard, Congress charged the Commission with the task of reconciling and accommodating those policies in specific cases.

The Court of Appeals in this case violated this statutory scheme. Treating the national rail transportation policy as if it were a virtual checklist of fully consistent policies, the Court of Appeals exalted one element of the policy over all others: the policy of assuring "reasonable" rail rates where there is an absence of effective competition. 49 U.S.C. § 10101a(6) (*see* App. 5a, 27a, 34a-36a). The Court completely discounted the other elements of the national transportation policy that the Commission found would be "actively further[ed]" by the exemption of export coal. 367 I.C.C. at 586 (App. 73a). *See* page 14, *supra*. By elevating one policy over all the others, the Court of Appeals impermissibly reached an accommodation which Congress explicitly left to the Commission to make.

Thus, the Court of Appeals has unlawfully intruded on the domain of the Commission in carrying out the broad purpose of the exemption authority. In short, the Court of Appeals did here what this Court has repeatedly told reviewing courts that they cannot do: substitute their own judgment as to the wisdom of policy choices entrusted to the agency's decision. This Court should grant the requested writ to correct this fundamental error.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1629

COAL EXPORTERS ASSOCIATION OF THE
UNITED STATES, INC. AND
NATIONAL COAL ASSOCIATION, PETITIONERS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

NORFOLK & WESTERN RAILWAY COMPANY ET AL.,
COASTAL STATES ENERGY COMPANY,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.,
NIPPON STEEL CORPORATION ET AL., AND
PATRICK W. SIMMONS, INTERVENORS

No. 83-1633

EASTERN COAL TRANSPORTATION CONFERENCE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

NORFOLK & WESTERN RAILWAY COMPANY ET AL.,
COASTAL STATES ENERGY COMPANY, AND
PATRICK W. SIMMONS, INTERVENORS

Petitions for Review of an Order of the
Interstate Commerce Commission

Argued March 14, 1984

Decided September 18, 1984

Before WRIGHT, TAMM, and MIKVA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: In this case we review a decision of the Interstate Commerce Commission to exempt all rail transportation of coal destined for export through United States ports from all provisions of the Interstate Commerce Act (ICA), as amended.[1] Here, challenges are brought to the exemption decision by organizations of coal producers and other export coal shippers.

This case began when, on March 30, 1981, the Norfolk & Western Railway Company, a major carrier of export coal, filed a petition with the ICC under the exemption provision of the Staggers Rail Act of 1980, 49 U.S.C. § 10505 (1982).[2] The petition sought an exemption from regulation for all export coal traffic moving by rail through Atlantic and Gulf ports. In Septemper 1981 ICC issued a notice of proposed exemption in which it requested comments on partial or complete exemption of export coal traffic moving through all United States ports. *Notice of Proposed Exemption, Railroad Exemption—Export Coal*, 46 Fed. Reg. 44529

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[1] The provisions of the Interstate Commerce Act, as amended, may be found at 49 U.S.C. Subtitle IV (1982). For the Interstate Commerce Commission's decision, *see Ex Parte No. 346 (Sub-No. 7), Railroad Exemption—Export Coal*, 367 ICC 570 (1983) (hereinafter cited as *Decision*).

[2] Pub. L. No. 96-448, Title II, § 213, 94 STAT. 1912 (1980).

(September 4, 1981), Joint Appendix (JA) 173. A large number of comments were received, including comments from a number of federal government entities. Railroads uniformly favored an exemption, and their position was supported by the United States Department of Transportation. Mine owners and other shippers opposed the exemption, as did a number of river carrier, port, and ocean carrier interests, the Departments of State and Commerce, the ICC's Office of Special Counsel, and the United States Trade Representative. The Department of Justice took no position except to state that any such exemption must end antitrust immunity for exempted transportation. *Ex Parte No. 346 (Sub-No. 7), Railroad Exemption—Export Coal*, 367 ICC 570, 571 (1983) (hereinafter cited as *Decision*).

On March 3 and 4, 1983 the Commission announced its decision to exempt export coal and advised that an opinion explaining the decision was being prepared. On June 9, 1983 the decision was issued. *See* note 1 *supra*. ICC Chairman Taylor filed a dissenting opinion.

This case again focuses this court on the exemption provision of the Staggers Act, 49 U.S.C. § 10505 (1982), *see Brae Corp. v. United States*, —— F.2d —— (D.C. Cir. No. 83-1462, decided June 27, 1984) (reviewing ICC exemption of boxcar transportation); *see also Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982); *McGuinness v. ICC*, 662 F.2d 853 (D.C. Cir. 1981).[3] In particular,

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[3] The exemption provision, in relevant part, reads:

> In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
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> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and

this case requires that we examine two closely related ICC findings, each of which is required by Section 10505 as a precondition to ICC's exercise of exemption author-

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(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a) (1982). In this case the Commission made no finding with respect to the issue of "limited scope," relying instead on its finding relating to "abuse of market power." *See Decision, supra* note 1, 367 ICC at 586 n.37.

Section 10101a, referred to in the exemption provision, reads:

In regarding the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

ity. The first finding was that the regulation lifted in this exemption was "not necessary to carry out the [national rail] transportation policy [49 U.S.C.] section 10101a[.]" 49 U.S.C. § 10505(a)(1) (1982). The second finding was that the regulation was "not needed to protect shippers from the abuse of market power." *See id.* § 10505(a)(2)(B). The two findings are particularly intertwined in this case because petitioners, as shippers, most emphasize an element of national rail transportation policy that assures the maintenance of "reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital[.]" *Id.* § 10101a(6). Obviously, the policy reflected in that element substantially overlaps with the provision relating to "protect[ing] shippers from the abuse of market power." Because the ICC's conclusions with respect to these legal standards reflect an unreasonable interpretation of their meaning, we must vacate and remand the exemption decision.[4]

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(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

49 U.S.C. § 10101a (1982).

[4] Petitioners have also argued that ICC's exemption decision must be vacated for failure to comply with a variety of procedural requirements of the Administrative Procedure Act and other laws. Because of our disposition of the case on other grounds, we need

Two interrelated challenges of petitioners will be discussed in this opinion. First, petitioners challenge the decision on the basis that the reasoning the ICC used

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reach no conclusions regarding the merits of most of these challenges. One of these challenges, however, we shall examine.

Petitioners contend that Commissioner Gradison, who voted in the exemption decision, was obliged to disqualify herself because her impartiality in this proceeding "might reasonably be questioned." 28 U.S.C. § 455(a) (1982). Because Commissioner Gradison may choose to participate in future proceedings concerning the matters raised in this case, we will discuss the contention that she should have disqualified herself in this proceeding.

Petitioners argued below that the Commission's Canon of Conduct, 49 C.F.R. § 1000.735-14(a) (1983), obliged Commissioner Gradison to disqualify herself in this case. In relevant part that canon states: "Members * * * shall not participate in any matter in which they have a substantial pecuniary interest or in which their impartiality might reasonably be questioned." Petitioners do not contend that Commissioner Gradison had any pecuniary interest in the outcome of this case. But they do contend that her impartiality "might reasonably be questioned." They point out that earlier in her career she had been an employee of the Southern Railway Company for eight years. Petitioners also point out that subsequent to Gradison's resignation from Southern it merged with the Norfolk & Western Railway Company, which was the original proponent of the exemption at issue in this case. Commissioner Gradison denied petitioners' motion for disqualification and filed a detailed explanation of her reasoning. Joint Appendix (JA) 177-195.

We reject petitioners' contention that it was improper for Commissioner Gradison to have denied the motion for her disqualification. Petitioners contend that "her duties [at Southern] included developing a rate structure for deregulated fresh fruits and vegetables with a view in part to gain experience should other areas of traffic be exempted." Reply brief of petitioners Coal Exporters Association of the United States, Inc. and National Coal Association (CEA/NCA) at 25 n.49. But even if this were so, such an employment record in itself implies no impropriety in her fully participating in exemption cases such as this. No contention is made that her prior employment experience is significant for reasons other than that it involved the Commissioner in a presumably partisan way in the general issues of rail carrier deregulation. Yet even on this issue no specific evidence of a closed mind is given. It is not surprising that a member of ICC has had substantial employment

to analyze the record before it and justify its action in relation to that record was arbitrary and capricious in violation of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). Second, petitioners argue that the ICC's interpretation of the Staggers Act's exemption authority, as reflected in the reasoning of the ICC's opinion, is an unreasonable one in relation to the statute's wording and legislative history. The latter argument focuses on the meaning of the provisions protective of shipper interests, particularly 49 U.S.C. §§ 10101a (6) and 10505(a)(2)(B) (1982). Our analysis turns more on this latter contention, but the two arguments are closely interrelated.

I. A General Overview of the Staggers Rail Act

Before analyzing the reasoning of the ICC and the challenges to the decision, it is useful to review the decision's statutory basis. The Staggers Rail Act of 1980 was a complex and comprehensive amendment to the ICA. The primary goal of the Act was to revitalize the railroad industry by reducing or eliminating regulatory burdens. Faced with railroad bankruptcies and the need to assure railroads of adequate revenues, Congress revamped the structure of railroad regulation in order to restore the industry to health.

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experience with a rail carrier. Nor is it surprising that ICC's rulemaking proceedings may involve policies that affect many rail carriers. The fact that a Commissioner had in the past done work for a carrier that has involved that person in the general areas of policy that surround a rulemaking cannot be sufficient to prevent that Commissioner's participation in that rulemaking. A Commissioner is not required to repudiate her past experiences upon assuming public office. Prior involvement in the general public issues facing an agency is not in itself a basis for disqualification from agency actions concerning those issues. *Cf. Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). *See also Laird v. Tatum*, 409 U.S. 824 (1972) (Memorandum of Rehnquist, J.).

The Staggers Act was not, however, a simple deregulation of the railroad industry. Instead, it was a simultaneous recognition of two conditions. On the one hand, Congress recognized that in large parts of the rail industry heavily regulated rail carriers faced competitive conditions. In many cases these carriers competed with other modes of transportation which were unregulated and therefore able to be more innovative and flexible. Congress found that too often the ICA's regulatory framework had become an unnecessary and crippling burden on the rail industry, and was an impediment to the industry's ability to attract the capital necessary to meet the nation's future needs.[5] On the other hand, however,

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[5] Congressional findings were explicitly set out in § 2 of the Act. Among them were findings that

> (3) today, most transportation within the United States is competitive;
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> (4) many of the Government regulations affecting railroads have become unnecessary and inefficient;
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> (5) nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads;
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> (6) earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements;
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> (8) failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional Federal subsidy; and
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> (9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation.

Pub. L. No. 96-448, § 2, 94 STAT. 1896 (1980), *reprinted at* 49 U.S.C. § 10101a note (1982).

Similarly, § 3 set out as a goal of the Act "reform [of] Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system[.]" Pub. L. No. 96-448, § 3(2), 94 STAT. 1897 (1980), *reprinted at* 49 U.S.C. § 10101a note (1982).

Congress recognized that sometimes competition would be insufficient to protect the legitimate interests of shippers, small carriers, and the public, and thus that full deregulation of the industry was unjustified by industry conditions. The legislation that eventually became the Staggers Act was subject to significant modification during floor debate, with many of the successful amendments supported by legislators who feared that the bills that emerged from the committees might not afford adequate protection to shippers where they might otherwise suffer from abuses of market power. The resulting Act was a compromise that enjoyed overwhelming support. Although the legislation was without doubt a significant reduction in railroad regulation, as this court has said, "The legislation * * * did not strip the Commission of its power and duty to protect shippers from the unreasonably high rates of carriers with market dominance." *Burlington Northern Inc. v. United States*, 661 F.2d 964, 973 (D.C. Cir. 1981). Both before and after the amendments the bills' sponsors agreed that the underlying approach of the legislation was to move toward much greater reliance on market forces rather than regulation to govern rail carriage, but to temper that move with a policy of retaining regulation where the market would be insufficient to protect shippers and the public from abusive railroad practices.[6]

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[6] The legislative history of the Act is full of descriptions of it by conference committee members, sponsors, leading proponents, and floor leaders as a detailed and delicate compromise that accommodated the interests of carriers, shippers, and the public, reducing or eliminating regulation where appropriate and preserving regulatory protection for shippers where necessary. *See, e.g.*, 126 Cong. Rec. S14005 (daily ed. Sept. 30, 1980) (comments of Sen. Exon); *id.* at S14003 (comments of Sen. Long); *id.* at H10086-H10087 (comments of Rep. Rahall); *id.* at H8555-H8556 (comments of Rep. Loeffler); *id.* at H8550-H8551 (comments of Rep. Rahall).

More important, this compromise nature is reflected throughout the Act. It is most recognizable in those general policy provisions of the Act that speak to shipper interests. The statement of goals

The Staggers Act exemption provision is an "important cornerstone" of the overall statutory scheme in that it represents Congress' determination that there be continuing evaluation of the appropriateness of regulation and continuing deregulation where consistent with the Act's policies. H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 60 (1980). It is also a recognition that an administrative agency is better suited than Congress to evaluate on a continuing basis the specific need for the various aspects of the regulatory scheme in particular contexts.[7] There is no doubt that the exemption provision was intended to give ICC very broad authority to eliminate unnecessary regulation. *See American Trucking Ass'ns, Inc. v. ICC*, 656 F.2d 1115, 1118-1120 (5th Cir. 1981). Congress' delegation of exemption authority to ICC, however, was a conditional one. It included guidelines that con-

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includes as one of the Act's goals "to provide a regulatory process that balances the needs of carriers, shippers, and the public[.]" Pub. L. No. 96-448, § 3(4), 94 STAT. 1897 (1980), *reprinted at* 49 U.S.C. § 10101a note (1982). Similarly, the statute's declaration of national rail policy includes such policies as "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital," *Id.* § 10101a(6), and "to avoid undue concentrations of market power[.]" *Id.* § 10101a(13). As we discuss in text, the elements of national rail policy limit the Commission's exemption power, *id.* § 10505(a)(1), and the power is further limited where the regulation to be lifted is "needed to protect shippers from the abuse of market power." *Id.* § 10505(a)(2)(B).

[7] As the Conference Report states:

> The policy underlying [the exemption] provision is that while Congress has been able to indentify [*sic*] broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be reregulated consistent with the policies of Congress. * * *

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980).

ditioned that authority so as to preserve the policy balance embodied in the Act. As the Conference Report specified, the task of the agency is "to determine where [there] can be deregulat[ion] consistent with the policies of Congress." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sss. 105 (1980). The statute sets out these policies as conditions on the Commission's exemption authority. Where ICC properly finds the conditions to be present, it has no choice but to grant an exemption. But in the absence of such findings ICC has no exemption authority.[8]

As we discussed, petitioners in this case challenge the reasoning used by the Commission with respect to two limits with which Congress conditioned the ICC's exemption power: the element of national rail policy concerned with maintaining reasonable rail rates in the absence of effective competition, *see* 49 U.S.C. § 10101a(6) (1982), and the explicit limit on the ICC's ability to grant exemptions from regulatory provisions "needed to protect shippers from the abuse of market power." *See id.* § 10505(a)(2)(B). To understand how these issues arise in this case, we must turn to the Commission's complex opinion, that opinion's view of the export coal industry, and the Commission's analysis of the legal significance of its factual findings.

II. The ICC's Findings Respecting the Export Coal Industry

The ICC's opinion is premised on the general finding that in the absence of regulation railroads would be sufficiently constrained by various forms of competition that they would not be expected to abuse any market power they might hold with respect to shippers of export coal. Four forms of competition were offered and discussed by the Commission: (1) the competition that U.S. railroads face because the coal they carry for export must

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[8] *See* note 3 *supra* and accompanying text.

compete in a world coal market where numerous countries actively produce and market coal for export; (2) the geographic competition that each railroad faces because the coal it carries must compete with coal produced in other regions of the United States; (3) the intramodal competition that each railroad faces because shippers can switch to other railroads to carry their coal; and (4) the intermodal competition that a railroad faces because shippers can switch to other modes of transportation, *e.g.*, trucks, barges, or pipelines.

Petitioners argue here and they and the dissenting chairman of the Commission argue below that these factors simply cannot be expected to effectively constrain railroad market power, that 95 percent of the U.S. coal mines producing for export are served by only one rail line and have no practical alternative method of shipping their coal to port, and that after deregulation these shippers will likely fall victim to the monopolistic practices of the railroads upon which they must rely. They challenge much of the data relied on by ICC and assert that much relevant evidence was ignored or mischaracterized to justify a result contrary to the clear weight of the evidence. The Commission counters that past pricing patterns support the hypothesis that railroad practices have been constained by market forces and, more important, the Commission predicts how future behavior will be sufficiently constrained. The dispute is in part a dispute over ICC's use of evidence in the record, but it is also a dispute over the legal question of how much constraint market forces must place on railroad behavior before the Commission can deregulate under the exemption provision. We will summarize ICC's discussion with respect to each of the four competitive factors, as well as petitioners' challenges to ICC's discussion. We will then analyze ICC's discussion of the significance of past railroad price behavior and, more important, its discussion of the legal significance of predicted future behavior. In this discussion ICC's understanding of the

statutory standards for exemption emerged. We vacate because it is clear to us that ICC misunderstood the content of the statute's demands.

A. *Competition in the World Coal Market*

A large portion of the ICC opinion was devoted to explaining the position of U.S. coal in the world coal market. *See Decision, supra,* 367 ICC at 571-576. The analysis focused on the fact that "United States coal shippers face intense competition from major coal suppliers around the world[; that t]hese competitors are large, well organized, and sometimes government-supported firms in Australia, South Africa, Canada, Poland, and West Germany[; and] that suppliers in these countries have been quite effective in expanding their market shares in recent years * * *." *Id.* at 572.

The opinion painted a picture of a market in which nations aggressively market coal for use in Western Europe and the Far East for steel manufacture (called metallurgical coal or met coal) and generating electricity (called stead coal). Foreign purchasers initially evaluate suppliers "on the basis of quality and security of supply[,]" and because "[u]sually this process identifies several qualified suppliers[, purchasers reach a] final decision * * * almost invariably * * * on the basis of competitive price." *Id.* at 573-574. The market is price sensitive in that any increase in the delivered price of U.S. coal will likely result in a decrease in the quantity demanded and an increase in the quantity of coal purchased from other exporting nations. *Id.* at 575. Because rail transportation costs are a significant component of the delivered price of export coal, the market's price sensitivity, in ICC's view, will limit the ability of railroads to raise rates.

ICC admitted a number of factors that could arguably limit the degree of competition and create substantial foreign reliance on U.S. coal. For example, due to

political instability, labor problems, export quotas, or insufficient capital, "[t]o some extent, each of the countries competing with the United States has been hampered in its efforts to expand production." *Id.* at 574. The United States, in contrast, has been a dependable, long-term coal source that can thus demand a higher price. *Id.* at 576. Similarly, ICC admits that coal is not fungible: "There are certain requirements for particular uses because coal must possess the proper ash, moisture, sulfur, and carbon content, have the requisite volatility, and supply the necessary thermal units to be effective at a given site." *Id.* at 573. These "specifications are more rigid for metallurgical" coal, which "must be of a very high quality[,]" *id.*, and this has made "the United States * * * the chief supplier because of its high quality Appalachian coal." *Id.* at 575.

However, ICC went on to explain that these sorts of factors would not give the United States market power in the world market. It found that in spite of the fact that the U.S. is the most dependable supplier of coal and has substantial reserves, "the current development of [other] exporting countries and their plans for further expansion * * * leave little doubt that world coal supply will increase to meet any future increases in demand." *Id.* at 574.[9] It similarly found that the variability of coal qualities, the need for specified qualities for different uses, and the general high quality of U.S. met coal should not alter the conclusion that the U.S. cannot raise its coal prices without lowering its market share. ICC explained, "[I]t is clear that technological improvements in the production of coke and the manufacture of steel,

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[9] *See also Decision, supra* note 1, 367 ICC at 575 ("Coal production has now been expanded throughout the world beyond the reasonable ability of the current market to absorb it, and this surplus is aggravated by the current decline in the world price of oil. These trends ensure that there will most likely continue to be vigorous price competition in the world * * * market at least for the near future." (footnote omitted)).

as well as greater experience in blending coals of disparate characteristics to achieve a desired quality of coke, have lessened the restrictions on metallurgical coal and permitted the use of lower grade coal. This has allowed more suppliers into the market and greatly heightened worldwide competition for metallurgical coal sales." *Id.* at 573 (footnote omitted). Moreover, any premium that U.S. coal can demand on the basis of quality or reliability of supply is already reflected in coal prices. *Id.* at 576.

ICC's analysis of the world coal market leads it to the conclusion that any increase in U.S. coal's delivered price will lead purchasers to increase the purchases from other nations. The U.S. market share would thus decline. Although the Commission's opinion contains no economic analysis of exactly how sensitive the world market would be to any U.S. price increases—indeed the discussion is quite general—it does conclude that the world market is "extremely sensitive to changes in the delivered price." *Id.* at 574. At one point it describes the world "pricing arena" as one "in which the world delivered price of coal is highly constrained by competitive market forces[.]" *Id.* at 592. At another point it concludes that "[p]rice competition for export coal is such than even a 10-percent increase in the delivered price of American coal can be the difference between obtaining a market or losing it entirely." *Id.* at 593.

ICC Chairman Taylor in his dissent and petitioners in this court react to ICC's analysis of the world market by challenging its relevance. Even if the world market is such that U.S. market share will decline as price increases, and indeed even if it would establish a world "price cap" above which market share would decline rapidly enough to reduce export coal profits, this would still not protect American shippers from abuses of market power by railroads.[10] The issue is not whether Ameri-

[10] Petitioners did not agree that U.S. rail carriers would lack market power in the world market. For example, one brief cites

can interests have market power in the world coal market, but whether one component of the American export picture, railroads, have market power in relation to another component, coal producers and other shippers. Even if there is a "price cap" that prevents raising the delivered price of export coal, a railroad could still use monopoly power to raise rates to coal shippers and appropriate to itself an unreasonable portion of the profits generated by each shipment. Because of the cap, a captive shipper would be forced to lower its share of the total coal revenues if confronted with a rail rate increase. Although the existence of a world price cap for delivered U.S. coal means that foreign consumers will not have to pay a higher price, it does not assure that the division of revenues between the railroads and U.S. shippers will be a reasonable one. *See* id. at 600-601 (Chairman Taylor, dissenting).

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statistics that first show that 2/3 of all U.S. coal exports are met coal and only 1/3 are steam coal. They go on to show that in 1980 2/3 of Western Europe's met coal imports were from the U.S. They also point out that the Department of Justice, in its filing to the Commission, "stated that the U.S. 'appears to be the dominant supplier' of low and medium volatile metallurgical coal, and that * * * 'U.S. railroads would have substantial market power' because 'N&W and CSX (Chessi) have a virtual duopoly on the transportation of met coal.' " CEA/NCA brief at 32 n.*, *quoting* JA 639-640 (Justice Department submission to ICC). ICC Chairman Taylor similarly noted:

> There is considerable question regarding the effectiveness of competition in the movement of metallurgical (met) coal to Western Europe. The U.S. supplies 55 percent of Western European met coal and is considered the "swing supplier." The major alternative suppliers, Australia (labor problems), Poland (strikes and martial law), South Africa (political unrest and self-imposed quotas), and the U.S.S.R. are not considered reliable substitutes for U.S. coal.
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> *Decision, supra* note 1, 367 ICC at 600 n.78 (Chairman Taylor, dissenting).

B. *Geographic Competition*

In addition to the world market's constraining effect on rail pricing, ICC emphasized that geographic, intramodal, and intermodal competition would also constrain the practices of deregulated railroads. ICC began its analysis of geographic competition with an explanation of the regional nature of U.S. export coal production. "Eastern" coal is that mined in the Appalachian coalfields. Until 1979 the export coal industry centered around shipments of Appalachian metallurgical coal, but since that year's huge oil price increases steam coal export has also become important. *Id.* at 575. Eastern coal export includes both met and steam coal, and export production is mostly shipped to Europe. *Id.* at 577-579. "Midwestern" coal has a relatively high sulfur content and is mined in Ohio, Indiana, and Illinois. *Id.* at 577. ICC does not make clear to what use this coal is put when exported, but export production mostly goes to Europe as well. *Id.* at 579.[11] "Western" export coal includes coal from Colorado and Utah, where "small though increasing amounts" are sent to the Far East through West Coast ports. Coal from Wyoming's Powder River Basin, though there are vast tonnages, does not yet move for export because of its low BTU content. Prior to the 1979 oil price increase, virtually no western or midwestern coal was exported. By the third quarter of 1981 these coals made up about 12 percent of total export coal traffic.

Generally, different rail carriers transport the export coals of different regions. In the East and Midwest two rail systems transport most of the export coal: the Norfolk & Western Railway Company and the Chessie System (which includes both the Baltimore & Ohio and the

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[11] Petitioners made an issue of what the possible uses of midwestern coal were. They offered evidence to show that it could not practicably be used as a substitute for either eastern steam coal or met coal. *See* note 15 *infra*.

Chesapeake & Ohio). Conrail transports small amounts of eastern export coal. Other railroads operate in the West. *Id.* at 577-579. ICC's belief that to some degree competition between regions would act as a restraint on railroad power is premised on the notion that a foreign purchaser could purchase American coal from another American region if a price increased as a result of a railroad's raising prices. This would result in that railroad's loss of business just as if the purchaser had switched to the coal of another country. *Id.* at 579.

In support of its prediction the Commission cites the growth of western and midwestern export sales between 1979 and 1981 and the fact that during the same period the eastern railroads' percentage share of nationwide export traffic dropped. As ICC concluded:

> Although generally western coal for export now moves only to the Pacific Rim countries and the primary export market for eastern and midwestern coal is in Europe, competition among the regions appears to be growing. * * *

Id.

The idea that regional competition could be a significant constraint on railroad practices was challenged below in Chairman Taylor's dissent. He and the petitioners complained that, by ignoring the differences between coal qualities, volumes, and costs that result in part from geographic distance, the Commission found significance where none could reasonably be found:

> [G]eographic and product competition within the United States is neither a counterbalance nor a solution to the problem. The coal producing regions of the U.S. do not compete with each other for most of the export market. According to the railroads' own testimony, the vast coal reserves now available in the Powder River Basin (Montana and Wyoming) are a very long distance from port (over 1,000 miles) and the coal in such reserves is not of export quality,

> because its energy value is less than 10,000 BTU's and it has a relatively high moisture content. [Midwestern coal] is not of met quality and has too much sulfur for all but a small part of the steam coal export market. Coal from Colorado, Utah, and New Mexico goes to Japan, when there appears to be some competition with eastern coal. However, these western reserves produce no met coal, and the delivered price to Japan of eastern steam coal is more than $20 per ton higher than the delivered price of [this western coal]. Therefore, competition between the two sources is minimal. Almost all of our steam and met coal exports to Europe move through Atlantic ports.

Id. at 602 (Chairman Taylor, dissenting).

C. *Intramodal Competition*

Although Chairman Taylor and petitioners argue strenuously that export coal producers are largely captive to particular railroads and would thus be subject to railroad market power, the Commission found that intramodal competition (*i.e.*, competition between railroads) would provide significant constraints on railroad practices.

ICC did agree to many of the facts that underlay Chairman Taylor's and petitioners' arguments. In the East "very few mines are located on the lines of more than one railroad." *Id.* at 577-578. And "[e]xport coal originated on the lines of an eastern rail carrier is generally transported in single-line service to that carrier's own export coal facility." *Id.* at 578. Deviations from single-line rail transit would bring into play joint or combination rates that would be substantially above the single-line rates. *Id.* at 577 n.19. In the West, "[a]s in the East, individual mines are generally located on the lines of only one railroad." *Id.* at 579. For a variety of reasons, in spite of these facts ICC found that intra-

modal competition would be a significant restraint on railroad practices.

The Commission focused its analysis not on the individual mine but on an export coal "broker known as a transshipper." *Id.* at 571. Most export shipments are arranged by transshippers, which are very large companies that enter contracts with foreign purchasers, put together orders from a number of U.S. mines, and then arrange transportation. The mines may be owned by the transshipper or by other companies. *Id.* Because of the great size of the leading transshippers, and more importantly because they are free to fill their orders from mines on several rail lines, they have substantial bargaining power with respect to rail rates. *Id.* at 572. Their bargaining power may be even further heightened because many are owned by larger conglomerates that "may in some instances be able to exert leverage over particular railroad rates" as a result of other rail shipments with the railroad. *Id.*

ICC also argued that a large portion of export coal comes from mines owned by large coal companies, and that many of these companies own numerous mines located on different railroads. *Id.* at 578. Such a shipper's ability to shift production among its mines might allow it to pit one railroad against another and thus create intramodal competition to reduce a railroad's bargaining power. *Id.*

Again, the dissent and petitioners bitterly dispute the Commission's analysis and assert that the Commission failed to make certain inquiries necessary to its theory's validity and ignored significant evidence that would have called its theory into question. For example, Chairman Taylor first argued that the Commission ignored significant reasons to doubt that transshippers could sufficiently constrain railroads.

> The premise underlying the argument that export contracts can be freely filled from mines on more

> than one railroad is also unrealistic. First, export tonnage is frequently a blend of coal from several mines, and many times, some mines are on one railroad, some on another. Second, for a shipper to be able to substitute tonnage from a mine on a second railroad, certain conditions must be met, i.e., the tonnage must be available and not already committed to a long-term contract, the extraction costs must be relatively the same, and the tonnage from the second mine must be technologically substitutable for the tonnage from the first. Shippers point out that the chance for such substitution does not usually occur, especially since the Chessie hauls primarily met coal and the N&W primarily steam coal.[12] Third, there must be no price leadership, in that if one railroad raises its rates, the other will not, or at least not to the same level. It appears highly unlikely that all three of the foregoing conditions would coalesce, and even if they did, the advantage would accrue only to the particular shippers affected. The fact remains that 95 percent of the mines producing export coal are captive to the railroads that serve them.

Id. at 602. He then argued that the Commission's theory concerning the power of large shippers was similarly built on assumptions about the industry that ran counter to the evidence.

> The argument that big shippers can play one railroad against another (i.e., by substituting tonnage

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[12] According to a study submitted to the Commission on behalf of petitioners, the two major eastern railroads had to a great extent divided the export market between them according to coal type. Thus, in 1980, Norfolk & Western participated in shipping 93% of all eastern steam coal tonnage shipped for export, while Chessie participated in 13%. Chessie participated in shipping 81% of all met coal tonnage, while Norfolk & Western participated in 24%. *See* JA 994.

> from mines served by more than one carrier) is still less convincing, even were one to ignore the problem of lack of substitutability [of particular coals]. When a shipper negotiates with a railroad, its corporate affiliation is less important than its access to alternate transportation. There are over 100 companies involved in the export coal trade. Although some of the shippers are large, with connections to still larger entities, only 24 percent of the mines served by the Chessie System and the N&W are controlled by operators having mines on both railroads. As for the West and the Midwest, there appears to be virtually no possibility of substitution between railroads at the present time.

Id. at 602-603.

D. *Intermodal Competition*

The Commisison also concluded that deregulated railroads would have their market power constrained by competition with other modes of transportation. Three other modes are mentioned in the opinion: trucks, barges, and pipelines. The Commission noted, however, that truck and barge movement of export coal would not be feasible in the West. *Id.* at 579.

In support of its reliance on intramodal competition the Commission cites data showing that 13 percent of all coal production in the nation is transported by truck, *id.* at 578 & n.21, which demonstrates that trucks can successfully compete for short-haul movements of coal.[13] While mine-to-port traffic is usually long-haul, in the Commission's estimate trucks can "create[] the real po-

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[13] It seems undisputed that the 13% figure refers to all coal produced, not just coal produced for export. *See Decision, supra* note 1, 367 ICC at 601 (Chairman Taylor, dissenting). Petitioners submitted evidence that less than 1% of export coal is transported to port by truck. CEA/NCA brief at 17 & n.**.

tential for intermodal truck-barge or truck-rail movement to compete with an all-rail movement." *Id. at* 578.

To the extent a mine has access to inland waterways, ICC reasoned, barges can offer an alternative to rail carriage. This can result from a truck-barge combination or from direct access to waterways. The Commission offered statistics showing that "during the first 9 months of 1981, 17 percent of reported tidewater and coastal port shipments (nearly all of which is for export) was handled by inland water carriers." *Id.*

The last form of intermodal competition mentioned by the Commission is coal-slurry pipeline movement. There is no discussion of this, but at two points competition from coal-slurry pipeline is referred to as being a "partial" or "potential" competitive restraint on railroad power. *Id.* at 589 n.42, 594.

Petitioners and the dissenter dispute most of the premises on which the Commission built the argument for intermodal competition. They first point out that, although the Commission refers to coal-slurry pipeline competition, no such pipeline exists in the United States, *see id.* at 601 (Chairman Taylor, dissenting), and petitioners argue that construction of one would require difficult-to-pass federal legislation.

Petitioners challenge the Commission's reliance on barge transport by arguing that ICC's 17 percent estimate of coal transported at least in part by barge neglects to note a number of important points: (1) The figure was submitted by the railroads and conflicts with a previous ICC estimate placing the figure at seven percent, CEA/NCA brief at 18 n.**. (2) Much of the coal traffic that was transported in part by barge was initially carried from the mine by the same railroad that would otherwise have taken it to port via single-line route. A railroad that serves the origin exclusively would thus have power to determine the extent of export

barge traffic movement and its cost.[14] (3) Much of the barge-transported coal is high-sulfur midwestern coal, which offers little competition to lower-sulfur eastern steam or met coal.[15] (4) Even if some mines are close enough to waterways to be able to use barges without initial reliance on a railroad, such a situation is quite rare.

Their reaction to the Commission's discussion of truck transport was to emphasize that coal is a commodity of sufficient bulk that "truck competition is not economicially practical for large shipments or long distances." *Decision, supra*, 367 ICC at 601 (Chairman Taylor, dissenting).

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[14] Both petitioners and the dissenter note that, until complaints had been filed with ICC, eastern rail carriers, to discourage use of barges, had charged rates on export coal going to the Ohio River that were higher than the rates charged on export coal going to the railroads' Atlantic port facilities:

> Barge transportation [thus] almost always involves a prior movement by rail, which makes the railroad indispensable to the water carrier's ability to carry coal. * * * [Only] because the shippers and competing barge lines had recourse under the Interstate Commerce Act [did] the railroads drop[] their rates to the river to the domestic level.

Decision, supra note 1, 367 ICC at 601 (Chairman Taylor, dissenting).

[15] Although ICC did not explain its assertion that high-sulfur midwestern coal was substitutable for other coals, Chairman Taylor argued that midwestern coal "is not of met quality and has too much sulfur for all but a small part of the steam coal export market." *Decision, supra* note 1, 367 ICC at 602 (Chairman Taylor, dissenting). Evidence submitted by petitioners supported this view. They contended that mid-western coal cannot be substituted for met coal because of its sulfur content and cannot easily be substituted for steam coal in Europe because of European air pollution requirements that focus on coal quality. They argued that much of the coal exported from the midwest is used in cement manufacture and thus is not in competition with higher quality steam and met coals. *See* CEA/NCA brief at 27 & n.* (*citing* studies at JA 876-878, 1130).

E. *The Commission's Discussion of Rail Pricing History*

After discussing these forms of competition, the Commission turned to the history of rail pricing of export coal shipments and concluded that that history supported the conclusion that the competitive factors in fact had constrained railroad pricing. Two arguments were relied on.

First, the Commission noted that no maximum rate complaints concerning export coal rates had been filed prior to 1980. "Moreover, the 1980 complaints appear to have been filed not because of any new railroad rate actions, but because section 229(b) of the Staggers Act provided that rates not challenged by a certain date would foreover thereafter be conclusively presumed lawful." *Id.* at 580. In contrast to the pattern for domestic coal transport, where the railroads sought to test and expand the bounds of the rate standards—thus generating many complaints—export coal carriers "were content to raise their rates only in connection with general rate increases for all traffic[,]" and "[i]ndeed, the railroads 'flagged out' of several general rate increases on export coal." *Id.*

The Commission also compared the overall rise in coal prices and rail prices from 1969 to 1974, and from 1969 to 1981, and found that the comparisons showed "at a minimum that the unregulated shippers of export coal have considerable economic bargaining power in the contest over division of the economic rents from export coal. * * * This history indicates that the pricing restraint of rail carriers was not the result of the exercise of regulatory power by this Commission, but rather resulted from the play of market forces." *Id.* at 580-581.

Again the opponents of the decision have argued that the Commission has misused data and ignored relevant factors. They argue that the 1980 complaints concerning export rail rates have never been litigated by the Commission, were accompanied by evidence that rates

were generating revenues 200%-300% above the railroads' variable costs, and thus are strong evidence of railroad market power and cannot be so lightly dismissed by the Commission. *See* CEA/NCA brief at 33-34. Moreover, they challenge ICC's history of railroad pricing because its figures emphasize pricing behavior before 1976 when rail rates were heavily regulated.[16] Figures limited to the period since 1976, they say, would show significant railroad market power.[17]

III. ICC's Predictions of Future Railroad Behavior and Its Analysis of the Exemption Provision's Legal Standards

The foregoing discussion summarizes ICC's evaluation of data concerning competitive forces that would limit deregulated railroads' ability to abuse market power or unreasonably raise rates. It also reflects the challenges made to this part of ICC's analysis. ICC and the railroad intervenors have in their briefs and at oral argument contended that the Commission, as an expert agency, was entitled to make the factual findings and analyses

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[16] In 1976 Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 31 (1976). This forerunner of the Staggers Act was a significant lessening of regulation. In contrast, before 1976 "the ICC was charged with general superintendence of rates for transportation by rail. A 'just and reasonable' standard controlled all rates, rail users could challenge the reasonableness of rates, at any time, and the Commission had authority to determine what constituted a just and reasonable rate in each case." *Ford Motor Co. v. ICC*, 714 F.2d 1157, 1158 (D.C. Cir. 1983).

[17] *See* joint reply brief of petitioner Eastern Coal Transportation Conference and intervenor-petitioner Coastal States Energy Company at 14 ("Far more probative is the record from 1976 to 1981 when, utilizing new rate freedoms granted by the 4-R Act, carrier rates on export metallurgical coal rose by 59.5%. During the same period, minehead prices for the same product *declined* by almost 9%." (emphasis in original)).

that it did and based on those findings to conclude that an exemption could be granted because market forces would sufficiently constrain railroads. Petitioners repeatedly assert that ICC's findings and analysis were counter to the evidence presented, ignored significant data and comments, and thus should be found arbitrary and capricious. The finding that market forces would *sufficiently* constrain railroad behavior, however, is only in part a question of analysis of data; it begs the question how much market constraint on railroad behavior is sufficient. Put another way: what must ICC find before an exemption is justified? That is a legal, not a factual, question, and it involves not so much an analysis of the factual record concerning the structure of the relevant industry, but an examination of precisely what ICC actually found, what legal standard ICC used, and an analysis of how that conforms to congressional intent and the reasoned decisionmaking requirement. When we examine ICC's explanation of the legal theory for its decision, however, we discover that much of the basis for ICC's decision to exempt export coal is only indirectly related to many of the competitive factors that it discussed at such length.

A. *ICC's Findings with Respect to the Existence of "Market Power" and the Presence of "Effective Competition" and ICC's Predictions Concerning Price Discrimination by Railroads*

As discussed, the major shipper-protective limits on ICC exemption authority are 49 U.S.C. §§ 10101a(6) and 10505(a)(2)(B) (1982). The former provision establishes that national railroad policy is "to maintain reasonable rates where there is an absence of effective competition" so long as railroads earn revenues "which exceed the amount necessary to maintain the rail system and to attract capital." The latter limits the exemption power where regulation is necessary to "protect shippers from the abue of market power."

We begin with our analysis noting that the limits these provisions place on ICC's exemption power are met with a proper finding of an absence of "market power" and the presence of "effective competition." *See, e.g., Brae Corp. v. United States, supra,* —— F.2d at ——, slip op. at 28 (Commission found no "market dominance"), *id.* at ——, slip op. at 33 (Commission found no "monopoly power by railroads"). In this case, however, ICC never explicitly reached a conclusion that the railroad system carrying export coal would face "effective competition" and lack "market power." Indeed, the Commission specified that "the issue is not whether deregulation will give the railroads *some* market power but whether we conclude that an exemption will result in abuse. * * * [W]e point out that we may make a '[not needed to protect shippers from the abuse of market power'] finding even when there is no effective competition." *Decision, supra,* 367 ICC at 592 (emphasis in original).[18]

ICC's predictions concerning future railroad pricing policies make even clearer that its exemption decision was not premised on either an implicit or an explicit finding of "no market power" or of "effective competition." ICC's discussion of how the railroads are likely to behave in an unregulated environment rested on the

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[18] The Commission was correct in this assertion. The Conference Report makes clear that even where there is no effective competition constraining railroad market power an exemption may be proper if there will nevertheless be no abuse of market power. The kinds of situations envisioned, however, are not clear. The only one alluded to in the report is where other federal remedies would assure that market power will not be abused. *See* H.R. Conf. Rep. No. 96-1430, *supra* note 7, at 105 ("The bill permits exemptions wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition. * * * The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose.").

premise that unregulated railroads would be able and willing to price discriminate actively among coal shippers. Price differences would not simply reflect differing costs of providing transportation, but instead would reflect the availability to each shipper of transportation alternatives and each shipper's long-term marginal costs.

The regime of price discrimination envisioned by the Commission clearly assumes some significant degree of railroad monopoly power. First, it is well established that the ability of a firm to price discriminate is an indicator of significant monopoly power. *See, e.g.*, 2 P. AREEDA & D. TURNER, ANTITRUST LAW 343 ("[P]ersistent price discrimination * * * clearly indicates * * * that there is a lack of effective competition in the market where the higher net returns are made. In other words, it shows that the seller has market power."); R. BORK, THE ANTITRUST PARADOX 395 (1978) (it is "essential" to "[p]ersistent or stable price discrimination in favor of specific customers" that a "seller possess[] * * * a substantial degree of market power or monopoly"); R. POSNER, ANTITRUST LAW 63 (1976) ("[p]ersistent discrimination is very good evidence of monopoly because it is inconsistent with a competitive market"); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 89 (1977) ("A firm will not discriminate unless it has market power."). Second, the way the Commission discussed its predictions of price discrimination makes clear that it assumed railroads would have some significant degree of monopoly power.

ICC's prediction of future price discrimination was, in part, framed as a response to the comments opposing the exemption filed by the Departments of State and Commerce, the petitioners, and National Economic Research Associates (NERA), a research firm that submitted an extensive economic study on petitioners' behalf. These groups raised most of the points already discussed concerning the likely inability of competitive

factors to supply effective competition to export coal carriers. They concluded that an exemption would allow railroads to use monopoly power to raise rates substantially, and that that would reduce demand for U.S. coal abroad and thus reduce production levels. ICC summarized these arguments as follows:

> [They] believe that the railroads are[, because of the high proportion of shippers who are captive,] in a position to extract substantial premiums without fear of diverting traffic to other carriers. They fear that if export coal were deregulated the railroads would choose to raise rates to the point where a given volume will maximize revenues, even though some coal producers are excluded from the market and overall production is reduced. They perceive substantial potential for railroad abuse of market power and predict severely reduced coal exports and an overall decline in the Nation's prosperity.

Decision, supra, 367 ICC at 583; *see also id.* at 584.

The Commission's principal response was to assert that railroads would not price as would "simple monopolists" and reduce production levels. Instead, by price discrimination they could receive both monopoly revenues *and* maximized production. In the Commission's words:

> Opponents argue that railroads would accept the loss of some export coal since the loss would be more than offset for the railroads by an increased return on each ton of coal moved at higher rates. However, opponents' belief is the result of their mistaken assumption of uniform rate increases, *e.g.*, in the NERA model, the railroads are assumed to act like simple monopolists. A simple monopolist must accept the loss of one customer's business in order to raise prices to its other customers. The railroads, however, have persuaded us that they are not likely to act as simple monopolists but will price their

> services according to the cost and demand characteristics of each particular mine in order to retain the traffic. * * *

Id. at 592-593.[19] Indeed, the Commission attached an appendix to its decision where it analyzed the NERA study and offered as its major reason for not crediting it that "the NERA study is * * * based on a simple rather than a discriminating monopoly situation as discussed in the text." *Id.* at 615 (Appendix A).

ICC never explicity found the presence of "effective competition." Moreover, its extensive discussion of the railroad's ability to sustain a regime of price discrimination based on shippers' long-term marginal costs and access to transportation alternatives, its description of such price discrimination as "a discriminating monopoly situation," and its emphasis on its authority to grant an exemption even if there would be market power and no effective competition, all make clear that ICC was not implicitly finding that these factors established a situation of effective competition.[20] Instead, ICC accepted

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[19] *See also Decision, supra* note 1, 367 ICC at 587-588:

> Exemption will free the railroads to maximize their revenues by pricing on the basis of market demand and each mine's long-run marginal cost (including a return on cost of capital). By charging some of their more price-sensitive mines a lower rate and keeping them in the market, the railroads will be able to increase their revenue above what they would realize by increasing prices uniformly, as they have done in the past.

(Footnote omitted.)

[20] Our discussion of price discrimination and our citation to antitrust law texts is, of course, not meant to imply that ICC's understanding of "effective competition" must "strictly conform" to antitrust law standards. *See* S. Conf. Rep. No. 94-595, 94th Cong., 2d Sess. 148 (1976) ("While the absence of effective competition test is not intended to strictly confrom [*sic*] with the standards of the antitrust laws, it is intended that when the Commission administers

a model of railroad price discrimination under which carriers—because of the price cap for American coal in the world market—would price within the constraint

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the test it will recognize the absence of forces which normally govern competitive markets.") (report on the 4-R Act).

We also note that ICC's discussion of such competitive factors as geographic, intramodal, and intermodal competition did not attempt to analyze or define the degree to which these forces could actually provide shippers and receivers with substantial enough quantities of sufficiently substitutable goods or services at competitively practical prices. The absence of such relatively specific inquiries would seem to be another factor indicating that "effective competition" was not found. *See Market Dominance Determinations and Consideration of Product Competition*, 365 ICC 118, 132-135 (1981).

What the Commission clearly did argue in its opinion was that market forces did establish "substantial" constraints on railroad behavior. But that is not in conflict with the existence of monopoly power. As a leading economics text explains, all firms, even the pure monopolist—an entity which rarely exists in the real world—are subject to limits established by market forces. The issue is how effective are the limits.

> [T]he policies adopted by a pure monopolist are affected by certain indirect and potential forms of competition. Clearly, the monopolist is not completely insulated from the effect of actions taken in the rest of the economy. All commodities are rivals for the consumer's favor * * *. Clearly this rivalry occurs among different products, as well as among the producers of a given commodity. For example, meat competes in this sense with butter, eggs, and even men's suits. Of course, the extent of the competition from other products depends on the extent to which other products are substitutes for the monopolist's product. For example, even if a firm somehow could obtain a monopoly on the supply of steel in a particular market, it would still face considerable competition from producers of aluminum, plastics, and other materials that are reasonably good substitutes for steel.

E. MANSFIELD, MICROECONOMIC: THEORY AND APPLICATIONS 281 (3d ed. 1979).

Nor is there a conflict between ICC's predictions of future exercise of railroad monopoly power and its descriptions of past pricing behavior as being restrained by "the play of market forces." *Decision, supra* note 1, 367 ICC at 581. A close reading of its discussion

of not raising the delivered price of the coal, and thus could maximize their profits without reducing production. The method by which rates would be determined and revenues divided between shippers and railroads is explained as follows:

> [I]f (1) the world market will tolerate a port price of $50 a ton, (2) a mineowner could produce the coal for $20 a ton, and (3) the railroad could haul it to the port for $20 a ton, then the available profit to be shared between the producer and the railroad would be $10 a ton. If the railroad has numerous alternatives and the coal producer has none, the railroad would be likely to receive much of the $10 a ton profit. Similarly, if the coal producer is the party with the opportunities to mitigate the adverse consequences of failure to agree, then the coal producer would receive much of the profit. In many instances, both parties will probably have some alternatives, and the division of the profit should be somewhere between these limits. Under all possible divisions of the available profit, the competitive price of $50 a ton would prevail in the marketplace, and there would be no effect on the volume of coal purchased or produced. * * *

Decision, supra, 367 ICC at 582.

Although this model of price discrimination explains how railroads might earn monopoly profits without lowering production, it says nothing about what the distribution of rents between shippers and carriers would be. All it says is that the division will be at a point between that at which the shipper only recovers its costs while the carrier recovers all rent and that at which the shipper recovers all rent while the carrier recovers only

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of past pricing reveals that it states only that past behavior "is not the kind of behavior which we think characterizes entities exercising *unrestrained* market power." *Id.* at 580 (emphasis added).

its costs. *See id.* at 595 ("the railroads will * * * set their rates in an area between an individual mine's long-run marginal cost of extraction at the current cost of capital and the world market price"). The precise point will be determined by the amount of transportation competition that does exist for any particular shipper within this basically monopolistic framework. The competitive factors that we earlier discussed thus again become important. The degree to which they are present in any given case will determine the distribution of rents between shipper and carrier.

We will return to the question of exactly what legal import the Commission has assigned to these competitive factors when we discuss the ICC's analysis of the "not needed to protect shippers from the abuse of market power" provision of Section 10505(a)(2)(B). But first we turn to ICC's analysis of the provisions of the rail transportation policy, particularly the provision relating to "reasonable rates."

B. *ICC's Analysis of the Rail Transportation Policy and Particularly of Section 10101a(6)*

In order to grant an exemption ICC must find that the regulations to be lifted are "not necessary to carry out the transportation policy of [49 U.S.C. § 10101a]." 49 U.S.C. § 10505(a)(1) (1982). In its opinion ICC stated that it found that "[c]ontinued regulation of export coal traffic is not needed to carry out any of the 15 elements of rail transportation policy set out in 49 U.S.C. 10101a." *Decision, supra*, 367 ICC at 568. Although it discussed how the exemption would further a number of the policy provisions, it hardly mentioned the provision of the policy most clearly related to petitioners' claims, the provision that it is national policy "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system

and to attract capital." 49 U.S.C. § 10101a(6) (1982). The Commission mentioned Section 10101a(6) only once in its opinion, and then in a footnote that implied that the provision was inapplicable.

The one mention of Section 10101a(6) came in response to shippers' citations to various parts of the legislative history that referred to the need for protecting "captive shippers," particularly coal shippers. The Commission's cryptic response was simply that

> export coal must be distinguished from domestic coal transportation. Export coal traffic is not the captive traffic for which Congress continued rate regulation. See 49 U.S.C. 10101a(6). Rather, as we discuss elsewhere in this report, this traffic is subject to vigorous and growing competition from the world market and other transportation modes and energy sources, and these forces will provide adequate restraints on rates.

Decision, supra 367 ICC at 585 n.32.

This reference to Section 10101a(6) is troubling. The section is intended to protect shippers of any commodity where there is an absence of effective competition. Here, the Commission made no finding of effective competition. As discussed, such a finding would clearly have been in substantial tension with other language in the opinion. In spite of the assertedly "vigorous and growing" competitive restraints on the railroads' ratemaking power, the Commission predicted a regime of price discrimination that assumed railroad market power over shippers. Thus the Commission must still justify the exemption's consistency with Section 10101a(6)'s assurance of reasonable rates in the absence of effective competition.[21]

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[21] "Effective competition" is not only the standard for rate protection contained in § 10101a(6). It is also the standard in the rate provisions themselves. The Staggers Act withdrew ICC jurisdiction to regulate the rates of carriers who do not have "market

What explanation there is appears in the Commission's more general analysis of the "abuse of market power" provision.[22]

C. *ICC's Analysis of the "Abuse of Market Power" Standard of Section 10505(a)(2)(B) and its Application to This Case*

Most of ICC's analysis of why continued regulation "is not needed to protect shippers from the abuse of market power" focused on the establishment of rail rates and the division of revenues between railroads and shippers under the predicted system of price discrimination. It is also where the Commission made clear its understanding of the "abuse of market power" concept as it applies to an exemption where market power

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dominance" over the relevant shipper. 49 U.S.C. § 10709(c) (1982). "Market dominance" was defined as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies." *Id.* § 10709(a). As we have said, the agency made no explicit or implicit finding of "effective competition."

[22] Although the reference discussed in text was the only reference to § 10101a(6), the failure to discuss the section explicitly is not in itself fatal. But the Commission must nonetheless offer reasoning that assures this court that § 10101a(6)'s protection was properly considered and applied.

> The national transportation policy must guide the ICC in all its decisions. However, the ICC need not explicitly discuss in its decision each factor enumerated * * *. All that is necessary is that the essential basis of the ICC's rationale be clear enough so that a court can satisfy itself that the ICC has performed its function. * * *

Alamo Express, Inc. v. ICC, 673 F.2d 852, 860 (5th Cir. 1982) (citations omitted).

An explanation of the exemption's conformity with the rate reasonableness policy is especially important here, where petitioners throughout their participation below emphasized their concerns for rate reasonableness and submitted substantial amounts of evidence to support their contention that rates will not be reasonable after exemption.

does in fact exist. We look at this analysis to understand the Commission's conception of its responsibility to assure that reasonable rates will be maintained, and because we conclude that there was no proper consideration of the shipper protective limitations on the exemption power, we vacate the exemption granted in this case.

The Commission began its analysis of the "abuse of market power" concept by recalling that it had found that "strong worldwide competition" existed for export coal, and that American rail carriers could not by their unilateral action raise the delivered price that foreign users would pay. Given the Commission's expectation that the railroads were so constrained by the world price, the Commission asserted that

> the issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

Decision, supra, 367 ICC at 592. It then went on to conclude that "the railroads will not price their services so as to reduce American coal production." *Id.* These two elements become, for the Commission, the standard under which it evaluates whether or not an exemption will result in an abuse of market power. In other words, so long as coal shippers are not forced to reduce production (*i.e.*, so long as the rail rate leaves them a share of the revenue that covers their costs, including their costs of capital) and so long as they are not wholly excluded from any economic rents above that level, their rate is "reasonable" and there is no "abuse of market power."

Use of this standard can be seen in the Commission's repeated equation of a situation of reasonable rates or the absence of market power abuse with the situation in

which shippers recovered their costs and were thus able to maintain production levels and maybe even to acquire some economic rents. *See id.* at 587 (transshippers will have sufficient leverage "to prevent the railroads from appropriating all the rents"); *id.* at 593 (railroads will not "raise rates to the point where the traffic stops moving"); *id.* (rate increases are unlikely to be so high as "to reduce the volume of export coal significantly or to force the mineowners into a situation where their return on investment would be inadequate"); *id.* (railroads will not "appropriate all the economic rents"); *id.* at 594 (railroad will not abuse its market position by "raising rates to the point where the traffic stops").

One aspect of this standard is crucial: It is a standard which, in effect, views the distribution of economic rents between carriers with market power and shippers to be largely a matter of regulatory indifference, so long as shippers get some bare minimum. Other than assuring that production will not decline and that "all" rents will not go to the carriers, the Commission only assures that "[e]conomic rent will be divided in accordance with the relative bargaining power of the parties involved in particular cases. In some cases the shipper will have leverage; the converse will be true in others." *Id.* at 595 n.67. This regulatory indifference was viewed as proper, in spite of the fact that the situation envisioned would be one in which market power would exist and indeed determine the distribution of rents. As the Commission had stated, "[C]oal rates in an exempt environment will reflect the interplay of the economic strengths of all parties. That result is, we believe, exactly what Congress meant when it enjoined us in the [national transportation policy] to allow 'to the maximum extent possible' competition and demand for services to establish rail rates." *Id.* at 587.

It is important to note the role, within the Commission's legal argument, played by some of the competitive factors discussed at such length earlier in the opinion.

In particular, such factors as geographic, intramodal, and intermodal competition provide the parties with the bargaining power that will determine the division of economic rents between them. But because the Commission views almost all divisions as consistent with the policies of the Act, so long as shippers are not deprived of all rents, the legal importance of these factors seems very slight. Although the Commission, throughout its opinion, continues to insist in general terms that these competitive forces will give shippers substantial bargaining power and thus constrain railroads and assure reasonable rates, it simultaneously voices a standard under which any shipper bargaining power, over a bare minimum, is legally sufficient. We will return to evaluate the Commission's reliance on these competitive forces after evaluating the legal validity of the standard used by the Commission.

D. *The Legal Validity of the ICC's Understanding of the Statute's Protection for Shippers*

We vacate the Commission's exemption decision because the stated standard is a wholly unreasonable construction of the Staggers Act's accommodation between shipper and carrier interests. The concept of rate reasonableness in the Act is a complex one and one whose precise definition was generally left to ICC. Nevertheless, it is clear that Congress did intend for the concept to embody certain considerations, and that the division of revenues between monopolistic carriers and shippers (even when the shipper is still able to fully recover its costs) was certainly not a matter of regulatory indifference.

We take the Commission, in evaluating the exemption according to the standard we discussed, to be articulating a construction of the statutory phrase "abuse of market power." We also take that phrase to include within it Section 10101a(6)'s reasonable rate policy. We recognize that "considerable weight should be accorded to an

[agency's] construction of a statutory scheme it is entrusted to administer[.]" *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, ——, 104 S.Ct. 2778, 2782 (1984). This is especially so where the agency is assigned to formulate a policy accommodating competing policies or interests. But there are limits to our deference. "If [the agency's] notice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.*, —— U.S. at ——, 104 S.Ct. at 2783, *quoting United States v. Shimer*, 367 U.S. 374, 383 (1961). Here we admit that the Commission has substantial discretion as to how to carry out Congress' instruction concerning the accommodation of shipper and rail carrier interests; but wherever the bounds of its discretion are, we have no doubt that the agency's accommodation, as announced and applied in this case, "is not one that Congress would have sanctioned." Because of the newness and complexity of the statutory scheme, and because the agency has given us little help in interpreting the statute,[23] we will concentrate on only what we feel is the most obvious flaw in the agency's position.

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[23] Although the agency announced a standard concerning the "abuse of market power" provision, it did little to explain, in terms of the statute's language, structure, or history, why the concerns for protecting shippers from carrier monopoly power were met by that standard. In light of this absence of explanation, we note "that the limit placed on the judicial role by an agency's interpretation of a statute 'assumes an adequately articulated administrative decision interpreting the relevant statutory law within a range of reasonableness.'" *Northern Colorado Water Conservancy District v. FERC*, 730 F.2d 1509, 1517 (D.C. Cir. 1984), *quoting Obremski v. OPM*, 699 F.2d 1263, 1269 (D.C. Cir. 1983); *see also FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981) ("the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling").

The legislative history of the Staggers Act is filled with references to the need to reduce rail regulation, and two reasons were repeatedly cited: regulations had often become unnecessary for protection of shippers and the public because of the development of effective competition to rail carriage, and inefficient because they had deprived railroads of the ability to earn adequate revenues to attract the capital necessary for economic health. These concerns were what motivated Congress' deregulatory moves, and the record and legislation is filled with references to these concerns both as the reasons for deregulation *and as the limits of deregulation.*

This can easily be seen in the wording of Section 10101a(6) which adopts a policy of affirmatively seeking maintenance of reasonable rates (1) "where there is an absence of effective competition," and (2) "where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." But the same interplay of concerns can be seen throughout the structure of rate regulation in the Act, a structure we will briefly summarize.

Most of the rate provisions that seek to assure carrier freedom do so in the name of either effective competition or carrier revenue needs. Thus ICC has no jurisdiction to find a rate unreasonable unless it first finds that the carrier has "market dominance," 49 U.S.C. § 10709(c) (1982), a term defined as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies." *Id.* § 10709(a). Jurisdiction was further limited on the basis of a carrier's revenue needs. The Act established a presumption of no market dominance where a carrier's revenues from the rate would exceed its variable costs by less than a designated percentage. *Id.* § 10709(d). Even if a carrier is found to be market dominant, there are congressionally provided for zones of rate flexibility based, once again, on revenue adequacy. Within them rates can be increased if a carrier's reve-

nues are found to be inadequate. *Id.* § 10707a. *See generally Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 719 (D.C. Cir. 1984).

These provisions mirror ICC's traditional justifications for allowing carriers with market power some degree of price discrimination against captive shippers. Use of market power is justified where needed for revenue adequacy.

> The theory of differential pricing is that rates on some rail services must be set above full cost to compensate for services on which railroads are required to price below full cost to remain competitive.

Id. at 718 n.3; *see also San Antonio, Texas v. United States*, 631 F.2d 831, 852 (D.C. Cir. 1980); *Houston Lighting & Power Co. v. United States*, 606 F.2d 1131, 1148 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

The statutory scheme's link between revenue needs and rate freedom also, however, serves to limit the rate freedom of rail carriers with market power. As the Conference Report explained, "When the industry is earning revenues which are adequate, it is appropriate for the Commission to have the authority to review rate increases more carefully." H.R. Conf. Rep. No. 96-1430, *supra*, at 91. Concern for limiting the rate freedom of carriers with market dominance also appears in the Long-Cannon Amendment to the Staggers Act, which directs ICC to consider, in determining whether to investigate certain rates.

> (i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic; [and]
>
> (ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic[.]

49 U.S.C. § 10707a(e)(2)(B) (1982). The same factors are to be considered in rate reasonableness determinations. *Id.* § 10707a(e)(2)(C). The underlying logic of these instructions is that monopolistic discrimination should not be used to generate funds that could more efficiently and equitably be recovered elsewhere. The provision certainly assumes that the degree to which a monopolistic carrier will be able to extract rents from a captive shipper will be in some way limited by the carrier's revenue needs.

> The drafters * * * were primarily concerned about shippers of coal and other so-called "captive" shippers, and the amendment sought to assure that rate flexibility would not result in such shippers bearing a disproportionate share of responsibility for the needed improvement in the railroads' financial position. * * *

Arkansas Power & Light Co., 365 ICC 983, 988 (1982).[24]

Elsewhere in Section 10707a the idea that revenue needs were not only a justification for rate flexibility but also a limit on monopolistic pricing was made even clearer. In considering challenges to the reasonableness of certain authorized rate increases, the Commission was ordered to "give due consideration to whether the carrier proposing the rate increase has attained adequate revenues, * * * *giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved* * * *." 49 U.S.C. § 10707a(e)(1) (emphasis added). Indeed, the Conference Report ex-

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[24] Just as the drafters were concerned with such equitable concerns regarding captive shippers, they were also concerned with disproportionately burdening, as a class, the shippers of any particular captive commodity. Thus the Act requires rate reasonableness determinations to include consideration of "the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues." 49 U.S.C. § 10707a(e)(2)(C)(iii) (1982).

presses an even stronger concern for monopolistic rail carriers extracting "excessive profits" when it declares that "[t]his language is not intended to imply that excessive profits for inadequate revenue carriers are reasonable." H.R. Conf. Rep. No. 96-1430, *supra*, at 94.

The rate reasonableness provision of Section 10101a(6) and the "abuse of market power" provision of Section 10505(a)(2)(B) should be read as reflecting the policies of the statutory scheme of which they are a part. It is unreasonble to view a statutory scheme that allows shippers to complain that a market dominant carrier is charging rates that unnecessarily generate excessive profits as being indifferent concerning the distribution of economic rents between monopolistic carriers and their captive shippers. Similarly, such an indifference seems incompatible with a scheme that allows a shipper to complain that its higher rate is unjustified because necessary carrier revenues could be more equitably generated elsewhere on the carrier's system. Protecting the revenues of shippers who face carriers with market power was an essential goal, though not the only goal, of the compromise that produced the Staggers Act.

ICC rested its standard, in part, on Section 10101a(1) of the rail transportation policy, which speaks of establishing reasonable rates "to the maximum extent possible" through reliance on "competition and the demand for services." *See Decision, supra*, 367 ICC at 587. But this must be read in conformity with the other provisions and policies of the Act. Though competitive forces may exist and somewhat constrain railroad power, when they nevertheless do not rise to the level of "effective competition" ICC must explain why reliance on them is sufficient to protect those interests of shippers protected in the Act and alluded to in the policy declarations of Sections 10101a(6) and 10505(a)(2)(B). The standard that it put forth to do this here was not a reasonable one.

ICC also made reference to the policy of promoting railroad revenue adequacy. *See id.* at 587-588. But it

saw this duty as the equivalent of maximizing railroad revenue. Again, this fails to accept that the Act was a compromise, recognizing shippers' as well as carriers' interests. It here sought to maximize railroad revenue with no reference to the actual revenue needs of the carriers involved or the size of the revenue gains they would likely receive from the exemption, or the degree to which needed revenue gains would be disproportionately subsidized by one group.

The only protection that ICC recognized as a legal duty to provide shippers was to assure that rail rates would not prevent shippers' full cost recovery and would not totally exclude them from the division of economic rents. This was unreasonable and accordingly it is a basis for vacating the exemption.

E. *The Importance of Geographic, Intramodal, and Intermodal Competition*

Much of the debate in the briefs and at oral argument focused on the Commission's adoption of certain data to determine that significant geographic, intramodal, and intermodal competition would constrain railroad behavior. We discussed this in detail in Part II *supra*. We have not, however, reached specific conclusions on these allegations. We can instead, for a number of reasons, generally reject the Commission's assertion that these competitive factors justify the exemption.

First, the legal importance that the Commission attributed to these factors is not clear. Although the Commission repeatedly referred to these factors as substantial restraints on railroad behavior that made regulation unnecessary, it did not find that, as a result, the railroads lacked market power. Moreover, within the legal standard used by the Commission these factors play a minimal role. The exemption is justified, said the Commission, so long as production is not reduced and some economic rents go to shippers. In its view production would not decline because of the world price cap and the

self-interest of the price-discriminating monoplist, so the only significance of the other competitive factors would be to determine the division of rents between shippers and carriers. It is uncontroversial that *some* rents will go to shippers, and above that level, the Commission seemed to believe, the distribution is legally unimportant. Thus the legal importance of these competitve factors would be minimal in spite of the Commission's repeated references to them.

One might argue, however, that when the Commission discussed the standard on which the exemption was based, it was doing so within the understanding that the division of rents would, because of these competitive factors, equal some undisclosed balance that would constitute a condition of reasonable rates and nonabuse of market power. Indeed, the Commission repeatedly referred to these factors when it asserted this conclusion. Except for its discussion of the standard we have rejected, however, the Commission never attempted to explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and nonabuse of market power. Thus such an argument cannot save the exemption. An agency cannot hide the standards under which it operates for we are unable to evaluate whether its reasoning meets the reasoned decisionmaking requirement unless we know against what standards its factual findings have been judged. *See Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596 (D.C. Cir. 1971).

Conclusion

As we have discussed, the Commission's opinion predicts a pricing regime in which there will not be an absence of market power with respect to shippers. Indeed, the regime is premised on the railroads' use of market power. Nevertheless, the Commission predicts that railroad behavior will not constitute "abuse of market

power," as it understands the phrase. We have found the Commisison's understanding of that statutory phrase to be unreasonable in that it largely ignores the protections Congress meant to guarantee to shippers. We thus hold the Commission's grant of the exemption petition to have been not in accordance with law. We vacate the Commission's decision and order, and we remand the case to the Commission for any further proceedings that may be appropriate.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1629

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC. AND NATIONAL COAL ASSOCIATION, PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

NORFOLK & WESTERN RAILWAY COMPANY, ET AL., COASTAL STATES ENERGY COMPANY, ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL., NIPPON STEEL CORPORATION, ET AL., AND PATRICK W. SIMMONS, INTERVENORS

No. 83-1633

EASTERN COAL TRANSPORTATION CONFERENCE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

NORFOLK & WESTERN RAILWAY COMPANY, ET AL., COASTAL STATES ENERGY COMPANY, AND PATRICK W. SIMMONS, INTERVENORS

[Filed Sep. 18, 1984]

Petitions for Review of Orders of the
Interstate Commerce Commission

Before: WRIGHT, TAMM, and MIKVA, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Interstate Commerce Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Interstate Commerce Commission under review herein are hereby vacated and these cases are remanded to the Commission, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 18, 1984

Opinion for the Court filed by Circuit Judge Wright.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 346 (Sub. No. 7)
RAILROAD EXEMPTION—EXPORT COAL

Decided May 26, 1983

Petition for exemption of export coal is granted. Regulation is not necessary to carry out the rail transportation policy or to protect shippers from the abuse of market power.

DECISION

BY THE COMMISSION:

On September 4, 1981, we published a notice in the Federal Register (46 F.R. 44529) seeking comment on a proposal to exempt, pursuant to 49 U.S.C. 10505, export coal from some or all of our regulation. After considering the comments and hearing oral argument, we have decided to exempt export coal rail traffic moving from United States ports, including Great Lakes ports, from all provisions of 49 U.S.C. Subtitle IV. We will allow interested persons 30 days to comment on the question of whether the exemption should be extended to the transportation of export coal moving in all-rail service to Canada and Mexico.

We will first discuss the world market for export coal, the United States export coal transportation system, and the positions of the parties. We will then apply the statutory exemption criteria to the facts and discuss energy and environmental considerations.

I. BACKGROUND

On March 30, 1981, the Norfolk and Western Railway Company (now a subsidiary of Norfolk Southern Corporation) (N&W) petitioned us to exempt from regulation export coal traffic moving by rail through Atlantic and Gulf ports. Its petition was supported by the Chessie System Railroads (Chessie) and the Family Lines Rail System. In our September 4 notice, we expanded the scope of the request and sought comment on the merits of exempting all export coal traffic from some or all of our regulation. In response to the initial comments, petitioners narrowed the scope of the exemption request to the rate regulation provisions of the Interstate Commerce Act. 49 U.S.C. 10701-10712.[1] After analyzing the opening and reply statements, we sought further information, principally on the nature of the world coal market and whether coals from different countries are substitutable in filling buyers' steam or metallurgical coal requirements. That information was received on June 4, 1982. We heard oral argument on June 16, 1982.

All of the railroads appearing (including the Western Railroads[2]) and the United States Department of Transportation (DOT) favor the exemption. Mineowners, the National Industrial Transportation League, various other shippers, the Water Transport Association, the Commission's Office of Special Counsel, the United States Departments of Commerce (Commerce) and State (State) and the United States Trade Representative oppose it. The Department of Justice (DOJ) has expressed no opinion except that if an exemption is granted, the Commis-

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[1] Since we are granting the broader exemption initially proposed, we need not further consider this more limited exemption proposal.

[2] The Union Pacific Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Burlington Northern Railroad Company; Southern Pacific Transportation Company; Utah Railway Company; The Western Pacific Railroad Company; and The Denver and Rio Grande Western Railroad Company.

sion should make it clear, that, as a matter of law and policy, there can be no antitrust immunity for this transportation.

II. The World Market

A. *Structure*

Coal exported from the United States is a part of a competitive world coal market made up of large and sophisticated buyers and sellers. As explained below, this competition effectively restrains the rates charged by the rail carriers for transportation from mine to port, and the delivered price of the coal in foreign ports.

1. *The sellers.*—Several participants in this proceeding make much of the fact that many coal mines are served by a single rail carrier. We do not attach as much significance to this fact because we are concerned with rates for coal shipments. Most shipments of export coal are arranged not by a mine or an overseas buyer, but by a broker known as a transshipper. The transshipper assembles an order of coal and arranges shipping as required by the overseas buyer's schedule. A transshipper may also function as both producer and broker, and may supply coal from mines it owns as well as from mines of other companies. In this way it can collectivize the shipments of smaller producers. If there is a supply contract with a foreign user, it is almost invariably with the transshipper, and not with a specific mine.[3] Further, it is the transshipper who negotiates transportation rates with the rail carrier.

The majority of all U.S. coal exports are arranged by a small number of these companies. The eight largest transshippers account for 66 percent of coal exports on the Chessie and 83 percent on the N&W.[4] These ex-

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[3] Supp. N&W and Chessie, p. 17-13, supp. v.s. Ecklund, p. 3.

[4] See reply v.s. Chessie-N&W, Barber, at pp. 39-44 and reply, Thompson at pp. 5-9.

porters obtain coal from mines located on both of these two large and competing coal hauling roads as well as from Conrail and other carriers. Thus, while many mines are located on only one railroad line, the railroads must negotiate their rates with companies that can obtain coal from mines located on the lines of several carriers. This fact significantly undercuts the assumption that mines producing export coal are captive to individual railroads, or that the transshippers are without competitive alternatives.

We also think it important that the coal shipping companies are often owned by larger conglomerates such as AMOCO, Dupont, International Telephone and Telegraph, and Shell Oil Company, and that these companies may in some instances be able to exert leverage over particular railroad rates as a result of other domestic or export coal shipments or other rail traffic they tender. Further, many of these companies are developing international coal reserves which could be used to meet foreign demands for coal.[6]

Finally, we note that United States coal shippers face intense competition from major coal suppliers around the world. These competitors are large, well organized, and sometimes government-supported firms in Australia, South Africa, Canada, Poland, and West Germany. The record shows that suppliers in these countries have been quite effective in expanding their world market shares in recent years, as discussed in more detail below.

2. *The buyers.*—Most export coal is purchased by large users in industrialized nations. The two principal groups of consuming nations are in Western Europe and in the Far East or Pacific Rim. Because coal is a low-value bulk commodity, transportation costs account for a large portion of the delivered price of coal. Accordingly, coal is usually most economically imported from the nearest

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[6] Reply v.s. Chessie-N&W, Barber, pp. 16-17.

source, unless quality constraints and reliability of supply dictate otherwise.

Each supplier's market share of a particular market tends to be inversely related to distance from the particular market. For example, Australia and Canada export relatively little coal to Western Europe, but supply two-thirds of the coal imported by Pacific Rim countries (virtually all of Canada's coal is in the West and exports go through Pacific ports). Conversely, Poland and South Africa, which sell most of their coal to customers relatively close at hand in Western Europe and together supply more than half that areas's import market, are only secondary suppliers to the Far East.

Nevertheless, a few sales are always made to more distant markets, such as Australia to Western Europe or South Africa to Japan, because of quality differences, demand, security of supply, or old customer ties. The desire of importers for a variety of sources also operates to blur market lines. For example, South Africa, which shipped no coal to Japan until very recently, now accounts for 5 percent of the Japanese market.[6]

3. *Types of coal.*—Coal of various grades and qualities is found in most of the major coal exporting countries, so that, at any given time, coals of all types and grades compete for sale in Europe and the Far East. There are certain requirements for particular uses because coal must possess the proper ash, moisture, sulfur, and carbon content, have the requisite volatility, and supply the necessary thermal units to be effective at a given site.

There are two main uses for coal. Metallurgical coal is used in the production of steel, and must be of a very high quality. Steam coal, used primarily in the generation of electricity, need not meet quite so demanding a standard. Though specifications are more rigid for metallurgical than for steam coal, all coal must perform to

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[6] Supp. N&W-Chessie, v.s. Ecklund, p. 15.

strict requirements if it is to be useful in a particular operation, and thus coal purchases are boiler or process specific.

Although the shippers have contended that innovation in the way steel is produced will not have a profound effect on the market, it is clear that technological improvements in the production of coke and the manufacture of steel, as well as greater experience in blending coals of disparate characteristics to achieve a desired quality of coke, have lessened the restriction on metallurgical coal and permitted the use of lower grade coal.[7] This has allowed more suppliers into the market and greatly heightened worldwide competition for metallurgical coal sales.

Negotiation for the purchase of coal begins with laboratory test data (designating the mineral specifications) and the trial of relatively small sample quantities of coal. When a producer has established both the suitability of its coal for the buyer's particular use and its reliability, the chief remaining terms to be negotiated are quantity, price, and penalty premium provisions to assure delivered quality. Thus, the selection of potential suppliers is made on the basis of quality and security of supply. Usually this process identifies several qualified suppliers and the final decision is almost invariably made on the basis of competitive price.[8]

4. *Coal availability.*—To some extent, each of the countries competing with the United States has been hampered in its efforts to expand production. Both Australia and Poland have labor problems; South Africa has export quotas. Colombia and China have vast coal reserves but enormous expenditures are necessary to develop the export potential. Nevertheless, the current development of these exporting countries and their plans

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[7] Supp. N&W-Chessie, v.s. Ecklund, pp. 8-11.

[8] Comm. N&W-Chessie, v.s. Ecklund, pp. 9-13.

for further expansion (see appendix E) leave little doubt that world coal supply will increase to meet any future increases in demand.

Both Poland and South Africa, each with substantial coal reserves, are among the most aggressive exporters in the world market today. Poland seeks to recapture lost markets after its recent strike, and South Africa seeks to compensate for the falling price of gold. Both have recently reduced the price of their coal and have plans to expand production considerably. South Africa has recently increased its export quota and has financed a large expansion of its Richard's Bay port capacity. Australia and Canada also plan to increase both their production of coal and their port capacity, while heavy investments are being made to develop exports from Colombia and China.

B. *Pricing*

All of the principal parties in this proceeding agree that coal tends to move on a net delivered price basis. That is, within fairly close constraints, as a supplier's net delivered price increases, its market share decreases. Correlatively, as the net delivered price of coal close at hand increases, more coal moves longer distances across market lines.

Further, the international coal market is extremely sensitive to changes in the delivered price. The price sensitivity of overseas purchasers has been attested to by numerous parties. One particular illustration is the reaction of the Japanese to the rapid increase in the mine-mouth price of American metallurgical coal during 1974. Japanese users responded by: (1) purchasing more coal from Australia, (b) placing price ceilings on the escalation clauses in new contracts, and (c) developing technological innovations which reduced the need for metallurgical coal. Because of its high price, the United States' share of the Japanese coal market has been

steadily declining, while the market share of Canada and South Africa has gradually increased. In 1980 the United States had about 32 percent of the Japanese met coal market, down from 53 percent in 1970.[9] This experience shows quite vividly that foreign users will change suppliers if the delivered price of one supplier is relatively higher than others.

Coal production has now been expanded throughout the world beyond the reasonable ability of the current market to absorb it,[10] and this surplus is aggravated by the current decline in the world price of oil. These trends ensure that there will most likely continue to be vigorous price competition in the world export coal market at least for the near future.

C. *The Position of the U.S. in the Market*

Until quite recently, world coal trade centered around the ocean shipment of met coal, and the demand for that coal was affected by cyclical patterns of the steel industry. Though several countries exported this coal, the United States was the chief supplier because of its high quality Appalachian coal. This pattern altered radically in 1979 with the huge oil price increase, and within a short time steam coal used to generate electricity began being exported around the globe in very large quantities. Steam coal is available from a number of countries, some closer than the United States to the major markets. Since most of those sources also supply an acceptable quality of metallurgical coal, often at a lower delivered price, the United States rapidly lost its position as the world's principal coal exporter. Although the United States is geographically positioned to supply both Western Europe and the Far East, foreign suppliers are often able to de-

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[9] v.s. of Minoru Tada on behalf of Nippon Steel Corp., table 1.

[10] See for example reply N&W—Chessie, v.s. Ecklund, p. 4, and opposition letter of Nippon Steel Corporation.

liver their product to consuming regions at a price significantly below the price of coal from American origins. As appendix E illustrates, the U.S. delivered price for steam coal from western origins to Japan in 1980 was some 40 percent higher than the price for Australian coal.[11] Similarly, the delivered price for steam coal from Appalachian origins to Europe in 1980 was some 21 percent higher than the price for South African coal.[12] Canada offered a price to Japan equivalent to what the United States would offer but Poland's price to Europe (not shown in appendix E) would be much lower than ours.

As of 1980, the United States accounted for just over 20 percent of identified global steam coal exports, which is less than the 32 percent shipped from South Africa, less than the 30 percent shipped from Poland, and only slightly higher than the amount exported by both Australia and Canada combined.[13] America also had between 38 and 45 percent[14] of the world metallurgical coal market. Even when metallurgical coal is included with U.S. export movements of steam coal, the competition to our

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[11] Reply N&W-Chessie, v.s. Barber, p. 13. It has been difficult to develop precise estimates as the parties do not cite the same figures. Frequently they aggregate countries differently and cite figures for different years or cite to themselves rather than to independent sources. Where there is sharp disagreement among the parties, a wide range, or a complete absence of data, we have referred to ICF Incorporated, *Potential Role of Appalachian Producers in the Steam Coal Export Market: Task* #1, International Steam Coal Trade Analysis, prepared for the Appalachian Regional Commission, November, 1981, cited by NERA, and referred to below as the *Appalachian Study*. That study shows the U.S. having 29 percent of global steam coal exports in 1980. See appendix C, p. 1.

[12] Supp. N&W-Chessie, v.s. Ecklund, p. 5; Supp. v.s., NERA; tables 2 and 3. (The year in table 3 is given as "1981" but this apparently is a typographical error—both the text and the source refer to 1980.) The *Appalachian Study* shows 45 percent.

[13] Reply Chessie-N&W, v.s. Barber, at p. 13.

[14] *Id.*

exports is clearly evident; the combined share of total identified exports attributable to Australia and Canada (33 percent) and the combined share from Poland and South Africa (32 percent) were about equal to that of the United States (roughly 35 percent).[15] Overseas buyers are willing to pay a premium of about 10 percent[16] for American coal because this country has the advantage of political and economic stability and an abundant supply of coal. But because this premium is already reflected in the price of American coal, if any producer raises the price it shifts the equilibrium in favor of its competitors.

As State and Commerce, the International Trade Representative, and several overseas purchasers, including Nippon Steel Corporation and Anker Kolen of Rotterdam, all testify, unless American coal is competitively priced, purchasers will turn to other suppliers who will meet their specifications. This testimony is supported by the conclusion of the Inter-Agency Coal Task Force that the role of the United States in future coal trade "depends upon the buying strategies of the consuming nations, the policies and prices of competing exporters, and the actions taken by the United States to maintain reasonable prices, prompt delivery and dependable quality."[17]

III. U.S. Transportation System for Coal Export

A. *Structure*

Rigorous international competition for export coal sales is not the only source of pricing discipline faced by U.S. railroads. The market power of individual railroads is also constrained by intramodal, intermodal, and geo-

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[15] *Id.*

[16] Reply Chessie-N&W, v.s. Ecklund, p. 5, NERA, p. 54.

[17] U.S. Department of Energy, *Interim Report of the Interagency Coal Export Task Force*, January 1981 (DOE1-0012), at p. 4 [emphasis supplied].

graphic competition within the U.S. export coal market. Thus, even if the U.S. share of the world coal market would remain relatively stable, a U.S. railroad could not increase its rates on export coal without risking loss of traffic to coal mines located on the lines of other railroads or on waterways.

"Eastern" coal is mined in the Appalachian coalfields of Kentucky, Tennessee, Pennsylvania, Virginia, and West Virginia; "midwestern" coal includes the relatively high sulfur coalfields of Ohio, Indiana, and Illinois. These coals move primarily over the lines of N&W (to Lamberts Point) and over the two Chessie carriers, The Baltimore and Ohio Railroad Company (to Baltimore), and The Chesapeake and Ohio Railway Company (to Newport News). Indeed, as recently as 1979, these three carriers accounted for nearly 90 percent of total non-Canadian U.S. coal exports, although this share dropped to 65 percent with the boom in export coal movements in 1980 and 1981:

FIGURE 1

Volume and share of non-Canadian U.S. exports accounted for by B&O, C&O, and N&W, 1979-1981

(Millions of tons and percent)[18]

	Total non-Canadian exports		B&O		C&O		N&W	
	Tons	Percent	Tons	Percent	Tons	Percent	Tons	Percent
1979	45.6	100.0	9.1	20.0	8.8	19.3	23.0	50.4
1980	72.8	100.0	12.4	17.0	18.0	24.7	30.5	41.9
1981	92.4	100.0	12.7	13.7	15.7	17.0	31.9	34.5

Conrail also serves a number of Appalachian coal origins; although current export movements are limited, coal handling improvements on Conrail's lines and in Philadelphia will increase Conrail's coal export capability.

[18] Source: Reply N&W-Chessie, v.s. Barber, facing p. 33.

Export coal originated on the lines of an eastern rail carrier is generally transported in single-line service to that carrier's own export coal facility.[19] Nevertheless, although very few mines are located on the lines of more than one railroad, coal producers are not without bargaining power in dealing with their railroad. First, as noted above, rail rates for export coal movements are frequently negotiated not by the mineowner, but by a transshipper who is *not* limited to obtaining coal from the mines on only one railroad. Second, a substantial percentage of U.S. coal mines are controlled by large mining companies owning numerous mines on the lines of different railroads. These companies can credibly threaten to fill their orders from mines on other railroads or on waterways if a particular rail carrier does not offer reasonable rates.[20] Third, there is a substantial volume of coal—approximately 13 percent of total production [21]—which is currently moved by truck, and in many cases

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[19] Joint or combination rates are published from (for example) CSX origins to NWS' facility at Lamberts Point, but these rates are substantially above the single-line rates from the same origins to CSX' facilities at Newport News or Baltimore. Intermodal barge service is also available, but again the rail portion of the intermodal rate is substantially above the corresponding single-line rate (on a dollar/ton or dollar/ton-mile basis). Supp. N&W-Chessie, pp. 29-31.

[20] Six companies account for 68.5 percent of all of N&W's single-line export coal business, while the same number account for 57.0 percent and 54.8 percent for B&O and C&O, respectively. Four companies (Pittston, Consol, A.T. Massey, and Island Creek) are among the top six shippers on both N&W and B&O; two of these are also among the top six shippers on C&O. Reply N&W-Chessie, v.s. Thompson, at p. 8. These companies shipped from many different origins; on the C&O, for example, 164 different origins accounted for 64 percen of its export coal traffic. *Id.*, v.s. Gobrecht, p. 14.

[21] The Department of Energy's 1981 publication, United States Coal at a Glance, 1980, shows that 13 percent of coal produced in the United States was transported by truck. See also N&W-Chessie, v.s. Gould, Landes & Stillman, pp. 21-22 and exhibit 1.

coal can easily be trucked to the tipple of another railroad for domestic or export movement. The ability of trucks to successfully compete for short-haul movements of coal has an effect on competition for long-haul movements of coal. It creates the real potential for intermodal truck-barge or truck-rail movement to compete with an all-rail movement. Finally, some mines have direct access to waterways and others are located close enough to a waterway to permit feasible truck/barge intermodal operations. For example, during the first 9 months of 1981, 17 percent of reported tidewater and coastal port shipments (nearly all of which is for export) was handled by inland water carriers.[22]

Coal from Colorado and Utah is moving in small though increasing amounts through West Coast ports over either the Union Pacific Railroad Company or The Denver and Rio Grande Western Railroad Company (in joint-line service with Southern Pacific Transportation Company). For example, Union Pacific handled 600 unit trains of export coal in 1981—almost four times the number in 1980.[23]

Coal from the Powder River Basin in Wyoming, which is currently served only by the Burlington Northern Railroad, does not yet move for export (in part due to its relatively low BTU content), but the substantial tonnages present in the area made exports a distinct possibility. Neither barge nor truck coal movements are feasible for western coal. As in the East, individual mines are generally located on the lines of only one railroad. Although generally western coal for export now moves

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[22] Reply N&W-Chessie, v.s. Barber, at p. 28 (citing data compiled and provided by the Department of Energy). Mr. Barber further notes that from some coal producing districts, the barge share was as high as 90 percent.

[23] Statement of Thomas B. Graves, Jr., of Union Pacific Railroad Company, before the Senate Subcommittee on Energy and Minerals Resources (December 3, 1981), at p. 2. (Cited by Barber, reply of N&W-Chessie at p. 31.)

only to the Pacific Rim countries and the primary export market for eastern and midwestern coal is in Europe, competition among the regions appears to be growing. Department of Energy data show that the proportion of shipments of export coal from the West and Midwest went from virtually nil in 1979 to nearly 12 percent of all export coal traffic in the third quarter of 1981.[24] During this same period, N&W and Chessie (combined) experienced a 27-percent reduction in their percentage share of non-Canadian coal exports.[25] Although some of the increased tonnage out of New Orleans during this period is properly ascribed to capacity constraints at the Atlantic ports, these data also suggest that midwestern coal can compete successfully in some markets with eastern coal.

Coal suppliers in each region compete with other suppliers in their own and in other regions for a portion of the American "share" of the world export market. Rail carriers within each region similarly compete with other rail carriers, or with barge carriers, in their own or in other regions for a "share" of that market. Transshippers compete with other transshippers, and also seek to maintain or even expand the American "share" of the world coal market by arranging for delivery of suitable coal to foreign buyers at the lowest possible price covering mine-mouth price, rail rates, vessel charter fees, and their own costs. By increasing its own prices, any of the many participants in the movement of coal from mine to foreign buyer can make a particular bid noncompetitive.

In short, a foreign buyer has more than a choice of countries from which to purchase coal. At least with respect to the American market, that buyer also has a choice of regions, of mines, and of railroads. Thus, all participants in the export coal business, whether involved

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[24] Reply N&W-Chessie, v.s. Barber, p. 19.

[25] Computation from figure 1.

in extraction, rail transportation, water transportation, or brokerage, operate in a competitive environment in which an increase in the aggregate rate for their services can cause a foreign coal buyer to accept a bid involving other mines and other carriers. The forces of competition thus weigh equally on the pricing action of railroads, mines, transshippers, and barge owners. Yet only one of these participants—the railroads—is currently subject to any regulation.

B. *Pricing Behavior*

This history of rail export coal pricing behavior supports the premise of the railroads that the railroads' export coal prices are constrained by strong delivered price competition and that railroads are dealing with customers who have substantial bargaining power. At the outset, we note that not a single maximum rate complaint concerning export coal was filed with the Commission before 1980. Moreover, the 1980 complaints appear to have been filed not because of any new railroad rate actions, but because section 229(b) of the Staggers Act provided that rates not challenged by a certain date would forever thereafter be conclusively presumed lawful. We also note that section 229 of the Staggers Act immediately produced over 800 maximum rail rate complaints. In sharp contrast to this history for export coal, analogous movements of domestic coal during the same period were subjected to substantial increases, and were the subject of extensive litigation before the Commission and the courts. Further, the railroads were successful in persuading the Commission to change its maximum rate standards. The railroads, however, did not at the same time seek to test the outer limits of rate regulation on export coal, but were content to raise their rates only in connection with general rate increases for all traffic. Indeed, the railroads "flagged out" of several general rate increases on export coal, presumably due to competitive factors. This is not the kind of behavior which

we think characterizes entities exercising unrestrained market power.

The railroads have argued that if export coal rates are deregulated they will be able to negotiate the shares of the available economic rents between every link in the export chain: producers, rail carriers, and ocean carriers. In analyzing this proposition, which we believe goes to the heart of this case, it is useful to observe how these economic rents have been divided in the past when the delivered price of coal has risen sharply due to world oil shortages. Between 1969 and 1974 minehead prices (in current dollars) increased 468 percent, while export rail rates rose only 57 percent.[26] Coal prices (in real dollar terms) as of December 1981 were more than two and a half times greater than they were in 1969, but export rail rates increased by less than half.[27] These results indicate at a minimum that the unregulated shippers of export coal have considerable economic bargaining power in the contest over division of the economic rents from export coal. We recognize that the past is not a perfect indication of future conduct, but we think that it is significant that no complaints were filed and that rates could not even keep pace with measures of rail average costs. In fact, between 1975 and 1981, export coal rates for the eastern carriers increased 82 percent while their overall index of materials costs rose 93 percent.[28] One eastern carrier, Conrail, recently reduced its rate on export coal at Philadelphia by 58 cents per ton.[29] This history indicates that the pricing restraint of rail carriers was not the result of the exercise of regulatory power by this Commission, but rather resulted from the play of market forces.

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[26] Reply N&W-Chessie, v.s. Barber, p. 49.

[27] *Id.*, pp. 49-50.

[28] *Id.*, p. 50. See also reply, N&W Chessie, v.s. Gobrecht, pp. 10-11.

[29] *Id.*, p. 32.

IV. Positions of the Parties

A. *Proponents' Arguments*

1. *Selective pricing.*—The railroads argue that they are economically rational, and will act according to their long-term economic self-interest if export traffic is exempted. This would lead them to price their services selectively rather than raise their rates uniformly.

The raailroads point out that it is undeniably to their advantage to generate as much revenue as possible on profitable traffic, and they can earn large profits from hauling coal. They argue that if they can increase rates on some movements and retain the traffic, they have an incentive to do so. However, if a rate increase would eliminate a particular movement, then they plainly have a disincentive to increase the rate on that movement. By charging their more price-sensitive mines a lower rate and keeping them in the market, the railroads intend to increase their revenue above what they would realize by increasing prices uniformly, driving some mines out of the market, and reducing tonnage. They submit that a reduction in volume would not be in their interest so long as they can charge different rates to different shippers.

In the absence of regulation, the railroads and DOT expect that coal rates would be arrived at through negotiation. They point out that because the world market sets a price cap for export coal, each party has great incentive to reach agreement, since failure results in the loss of the opportunity to share the profit. If a mine decides not to produce, the railroad loses traffic because foreign purchasers will obtain that coal volume from an overseas supplier, or from mines located on the lines of other carriers. The coal producer, however, may have some alternatives if no agreement is reached. Where a company is served by more than one railroad, or where it has access to barge or truck, its bargaining power would be improved. If it can sell its coal on the domestic

market, moving it via the regulated rates of the same carrier with which it is negotiating for an export rate, its bargaining position would be improved considerably. A shipper who could also draw upon coal from sereval mines on more than one railroad would be in a still better position.

The railroads explain that if (1) the world market will tolerate a port price of $50 a ton, (2) a mineowner could produce the coal for $20 a ton, and (3) the railroad could haul it to the port for $20 a ton, then the available profit to be shared between the producer and the railroad would be $10 a ton. If the railroad has numerous alternatives and the coal producer has none, the railroad would be likely to receive much of the $10 a ton profit. Similarly, if the coal producer is the party with the opportunities to mitigate the adverse consequences of failure to agree, then the coal producer would receive much of the profit. In many instances, both parties will probably have some alternatives, and the division of the profit should be somewhere between these limits. Under all possible divisions of the available profit, the competitive price of $50 a ton would prevail in the marketplace, and there would be no effect on the volume of coal purchased or produced. The carriers argue that even though the rail rate which results from negotiation may in come cases be higher than under regulation, it is better to allow railroads freely to negotiate the prices for their services to generate sufficient capital for the operation of safe and efficient transportation system.

2 *Relative bargaining power.*—The railroads have submitted[30] detailed information listing shippers, mine origins, port destinations, and tonnage shipped in 1981. They stress that many of the larger exporters are owned by energy conglomerates such as Shell, Conoco, and Amoco, and argue that the shippers are relatively few, very large, and highly concentrated. The railroads and

[30] Under cover of protective order.

DOT maintain that the exporters are not captive to any particular carrier, but rather are free to shift among mines served by different railroads and to seek out inland transportation on the most attractive terms. They argue that a single railroad, however, is vitally dependent on the mines on its lines and must respond to the competitive alternatives available to coal shippers. In bargaining with these shippers, railroad pricing inflexibility may result in a large loss of traffic and revenue.

3. *Facilitating contracts.*—The railroads and DOT argue that if export coal were deregulated they would be in a stronger position to negotiate long-term export coal rate contracts. The railroads claim that currently shippers who would sign such contracts insist upon a clause which would bind them to rate and service commitments while allowing regulatory intervention seriously to erode projected revenue. The two largest coal exporters, Chessie and N&W, in their pleadings state that they have entered no long-term contracts for the transportation of export coal despite the advantages they feel could be gained through contracting. We note that these railroads now have filed contracts for export coal despite the advantages they feel could be gained through contracting. We note that these railroads now have filed contracts for export coal movements.

B. *Opponents' Arguments*

The mineowners and the shippers, joined by Commerce and State and the Special Counsel's Office, maintain that the railroads possess market power over coal exporters and will abuse that power in the absence of regulation. They note that although world competition sets a maximum price for export coal, in the absence of regulation the railroads and the mines would be forced to compete for the same dollars. They contend that, within the range between the mine-mouth cost and the world price, pricing discretion is unconstrained by world market competition. The railroads, they argue, could reduce the mine-mouth price of coal by raising their rates, and move producers

closer to their marginal costs of production, and appropriate most of the available economic rents.

Commerce and State note hat over 95 percent of individual mines producing export coal are served by only one railroad, and that most traffic, especially in the East, is handled by a single railroad from mine to port. The coal companies believe that the railroads are thus in a position to extract substantial premiums without fear of diverting traffic to other carriers. They fear, that if export coal were deregulated the railroads would choose to raise rates to the point where a given volume will maximize revenues, even though some coal producers are excluded from the market and overall production is reduced. They perceive substantial potential for railroad abuse of market power and predict severely reduced coal exports and an overall decline in the Nation's prosperity.

The National Industrial Transportation League is concerned that deregulation might induce the railroads to place so much of their resources into export coal that they would be unable to fulfill their common carrier obligation to other shippers. It also fears that the railroads may so *reduce* the rates on export coal that domestic shippers will be forced to subsidize export traffic.

The water carriers argue that if the exemption were granted the railroads would be able to charge higher export rates to ports whose dumping facilities they do not own, thus frustrating the building of private coal piers and curtailing the expansion of export capacity. They argue that the railroads have already restricted their barge transshipment rates. If the exemption were granted, the railroads would be free effectively to foreclose a shipper's freedom of choice by imposing rate or service disadvantages on the rail-water alternative as to nullify the competition.

Commerce, State, and NERA [31] predict that deregulation would result in rates which would depress export coal

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[31] National Economic Research Associates (NERA), on behalf of the coal exporters, has attempted to forecast the economic conse-

volumes. They fear that this would reduce employment, adversely affect our balance of trade, and jeopardize United States security as well as our international energy policy, which favors the use of coal by our allies. Commerce and State see this outcome as inconsistent with both the President's Coal Export Policy Statement, which stresses expansion of our coal exports, and with the national rail transportation policy to ensure effective competition "to meet the needs of the public and national defense" (49 U.S.C. 10101a(4)).

Commerce and State also argue that importing nations would view the deregulation of export coal (while domestic coal remained regulated) as discrimination aimed at extracting higher prices from overseas customers. That perception, they say, would very likely lead foreign customers to shift their planned coal purchases to other producing nations offering greater anticipated stability in the pricing of transportation.

After carefully considering the comments we have decided to grant the export coal exemption.

V. Exemption Meets the Statutory Criteria of Section 10505

Our action here is taken under 49 U.S.C. 10505, which gives us broad authority to eliminate unnecessary regulation. *American Trucking Association, Inc.* v. *ICC*, 656 F. 2d 1115, 1118-21, 1127 (5th Cir. 1981). See *Simmons* v. *ICC*, 697 F. 2d 326 (D.C. Cir. 982); *McGinness* v. *ICC*, 662 F. 2d 853, 855-57 (D.C. Cir. 1981). Section 10505 provides that the Commission "shall" grant an exemption whenever it finds that continued regulation

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quences of export coal deregulation. Based on an across the board 57-percent increase in rail rates it projects a loss of 450 million tons in coal exports, and a reduction in United States real income of $4.2 billion over the period 1983-90. The technical aspects of NERA's study and the railroads' criticism of it are analyzed in appendix A. As that analysis demonstrates, not only is NERA's study flawed in its premise, but its calculation of welfare loss is also inaccurate.

is not necessary to carry out the rail transportation policy and either the transaction is of limited scope or continued regulation is not necessary to protect shippers from market power abuse. Thus, the ultimate issue is whether regulation over any "matter related to a rail carrier," 49 U.S.C. 10505(a), *must* be retained. If regulation is not necessary, our instructions from Congress are to end it.[32]

Section 207 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210 (4R Act) (later codified at 49 U.S.C. 10505 (1978 Supp.)) gave us the authority to exempt railroad transactions or services from regulation if we found that regulation was (1) not necessary to carry out the transportation policy, (2) would be an unreasonable burden, and (3) would serve little or no useful public purpose. Section 213 of the Staggers Rail Act of 1980 relaxed the criteria under

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[32] Shipper interests argue that an exemption for export coal traffic is improper because coal was the one commodity singled out for protection during the deliberations on the Staggers Act. See comments of Coal Exporters Assn., p. 25. They point to language from the Senate Committee Report directing the Commission to ensure that coal traffic bear only its fair share of costs and that "higher rated captive traffic is not unduly burdened" and stating that the exemption power not be used "at the expense of captive shippers who have no reasonable transportation alternatives." S. Rept. 96-470, 96th Cong., 1st sess. (1979).

While we recognize that Congress was concerned about coal rates, we do not believe that concern was meant to remove the exemption power granted by the new statute. Section 10505, as enacted in the Staggers Act, explicitly authorizes us to exempt any "matter." See *McGinness* v. *ICC, supra,* 662 F.2d at 855-57; *American Trucking Ass'ns Inc.* v. *ICC, supra,* 656 F.2d at 1118-22. Moreover, export coal must be distinguished from domestic coal transportation. Export coal traffic is not the captive traffic for which Congress continued rate regulation. See 49 U.S.C. 10101a(6). Rather, as we discuss elsewhere in this report, this traffic is subject to vigorous and growing competition from the world market and other transportation modes and energy sources, and these forces will provide adequate restraints on rates.

which we are to consider proposed exemptions. Although an exemption still may be granted only when regulation is not necessary to carry out the rail transportation policy, section 10505 no longer requires a demonstration that continued regulation would impose an unreasonable burden on a petitioner or on interstate or foreign commerce and that regulation would serve little or no useful public purpose.

It is clear that Congress expected us to increase significantly the number and type of exemptions. The legislative history reveals that section 10505 was considered an "important cornerstone" of the Staggers Act and that, under it, "the Commission is charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section's standards." [33] The policy underlying section 10505 is that Congress has been able to identify broad areas where reduced regulation is clearly warranted, but that "the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." [34] The conferees expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed through the use of section 10505, and that the Commission will adopt a policy of reviewing carrier action after the fact to correct abuses of market power." [35]

In implementing section 10505, we have granted general exemptions from regulation for the rail transportation of fresh fruits and vegetables, and various agricultural commodities, and food items, among others; an

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[33] H.R. Rept. 96-1035, 96th Cong., 2d sess. 60 (1980).

[34] H. Conf. Rept. 96-1430, 96th Cong., 2d sess. 105 (1980) (Conf. Rept.)

[35] *Id.* at p. 105.

exemption for frozen foods has also been proposed. In addition, we exempted *all* transportation provided by railroads in "piggyback" equipment (trailers and containers on flatcars or TOFC/COFC)[36] and the transportation by boxcar of all commodities except nonferrous recyclable materials. Those actions are consistent with our exemptions here.

We grant the export coal exemption because continued regulation is not necessary either to carry out the rail transportation policy of section 10101 or to protect shippers from the abuse of market power, as we now explain.[37]

A. *The Exemption is Consistent with the National Transportation Policy*

Continued regulation of export coal traffic is not needed to carry out any of the 15 elements of the rail transportation policy set out in 49 U.S.C. 10101a. In fact, the exemption of this traffic from regulation will actively further several elements of that policy.

The principal thrust of the national transportation policy (NTP), and indeed the entire Staggers Act, is to allow competition and the demand for services to establish reasonable rail rates to the maximum extent possible and to minimize the need for Federal regulatory control over railroads. 49 U.S.C. 10101a(1) and (2). See also Conf. Rept. 88. In passing the Staggers Act Congress per-

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[36] This exemption was affirmed (with very limited exceptions) by the United States Court of Appeals for the Fifth Circuit in *American Trucking Association* v. *ICC, supra.*

[37] Section 10505(a)(2) directs the Commission to grant an exemption when it finds that a transaction or service is of limited scope or that regulation is not needed to protect shippers from the abuse of market power. We grant the exemption on the basis that continued regulation is not necessary either to carry out the rail transportation policy of section 10101a or to protect shippers from the abuse of market power. Therefore, there is no need to determine whether an export coal exemption is a matter of limited scope.

ceived that today, "most transportation is competitive and many * * * government regulations have become unnecessary and inefficient * * *. Modernization of economic regulation of railroads, with greater reliance on the market place, is essential to achieve maximum utilization of railroads, to save energy and combat inflation." *Id.*, at 79 In sum, Congress recognized that the role of market forces has too long been ignored as an effective check against railroad abuse of market power and that regulation has acted to stifle both healthy competition and the railroads' ability to generate sufficient funds to operate a safe and efficient rail transportation system.

The strong and growing competition for export coal traffic has convinced us that regulation is not necessary to further the NTP. As discussed above, United States coal exports compete in the highly competitive world coal market as well as with alternative sources of energy and other transportation modes. This competition effectively caps the delivered price of American export coal. Beneath that cap, the various parties participating in coal exports must share the economic rents available from the traffic. The broker transshippers who negotiate with the railroads for the shipment of most export coal (and who often can meet their contractual obligations by producing or purchasing coal from mines served by several different railroads)[38] have sufficient economic leverage to prevent the railroads from appropriating all the rents. That leverage ensures that coal rates in an exempt environment will reflect the interplay of the economic strengths of all parties. That result is, we believe, exactly what Congress meant when it enjoined us in the NTP to allow "to the maximum extent possible" competition and demand for services to establish rail rates. Given the relatively equal bargaining power of the involved parties, we see little merit in continuing to handicap the railroads' negotiating posture for the division of available economic rents from export coal. We believe that market competition and nat-

[38] See Supp. N&W-Chessie, p. 13.

ural forces of supply and demand, without interference from this regulatory agency, will establish reasonable and rational rates for this traffic.

Regulation is unnecessary to prevent predatory pricing and practices. See 49 U.S.C. 10101a(13). Predatory pricing is generally understood to mean lowering rates temporarily to drive a domestic competitor out of the market so that the predatory pricer will enjoy monopoly power. Given the size of the railroads involved here, the inadequate revenues of the major coal hauling railroads, and the large number of coal origins, it seems most unlikely that one railroad could exclude its competition altogether from the export coal traffic. But even if that unlikely event were to occur, the remaining railroad would still find its rates constrained by the world market cap. Thus, if carriers (even monopolies) price their services so that the delivered price exceeds the cap, foreign purchasers will obtain their coal volume from an overseas supplier or switch to another energy source. We emphasize that we consider predatory pricing very unlikely, because with or without our regulation, all the railroads have strong incentives to maintain the profitable traffic at maximum levels.

Exemption also will promote the efficiency of the transportation system and better enable rail carriers to earn more adequate revenues consistent with 49 U.S.C. 10101a (3). Exemption will free the railroads to maximize their revenues by pricing on the basis of market demand and each mine's longrun marginal cost (including a return on cost of capital). By charging some of their more price-sensitive mines a lower rate and keeping them in the market, the railroads will be able to increase their revenue above what they would realize by increasing prices uniformly, as they have done in the past.[39]

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[39] See generally Supp. N&W-Chessie. Such action would be consistent with 49 U.S.C. 10101a(11) which encourages rail carriers to rely on individual rate increases, limiting the use of increases of general applicability.

The key to increased efficiency is the fact that an exemption necessarily will encourage the use of long-term contract rates. The railroads argue persuasively that until now the fact that a complaint challenging an export coal rate could result in a Commission-mandated rate reduction has been a strong impediment to the negotiation of contract rates.[40] Moreover, carriers have alleged that shippers have frequently refused to enter a contract without a "regulatory backstop clause" affording them the benefit of any rate reductions secured by their competitors. This in turn undercuts the very certainty which the contract seeks to achieve.

Contracts foster efficiency because they provide the flexibility necessary to develop sensitive and innovative rate and service proposals, and the certainty of future business sufficient to justify new investment. At the same time, they give purchasers the reliable service they need, along with an asurance of price stability. Exemption of export coal from regulation is therefore consistent with the NTP because it not only removes impediments to efficient operations, but actively fosters efficient transportation arrangements. The resulting environment will make it possible for foreign buyers to rely on the United States for their coal, and thus assure the Nation's continued place in the world coal market.

Similarly, an exemption will encourage the "honest and efficient management of railroads" we are to encourage pursuant to 49 U.S.C. 10101a(10). Following enactment of the Staggers Act's reforms, the railroads have made substantial progress in pricing competitively, attracting

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[40] See Supp. NW-Chessie. Indeed, NW-Chessie states (supp. 3, 10) that there are virtually no pre-Staggers Act contracts for export coal and that even subsequently little long term contracting has been achieved. Although Chessie recently entered into a 30-year contract with members of a consortium building a new port coal terminal (*id.* at p. 11) the rate terms are predicated on existing rate levels.

new traffic and monitoring costs.[41] The flexibility created by our action here, which enables the railroads and sophisticated and powerful coal shipper interests to negotiate and divide any available economic rents from world market determined export coal net delivered rates, will ensure that rational ratemaking continues in the future.

Finally, an exemption will aid the development and continuation of effective competition and coordination among rail carriers and other modes. 49 U.S.C. 10101a (4) and (5). We think the marketing flexibility that will result from our action here will free the railroads to arrange intermodal movements where this will prove efficient.[42] Our prediction reflects our experience with other exemptions. In particular, following our exemption of TOFC/COFC traffic in 1981, several railroads implemented rate reductions to improve their competitive positions vis-a-vis motor carriers and other railroads.[43] We believe this exemption may well encourage similar results.[44] Moreover, the inevitable increase in negotiated

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[41] See *Arkansas Power & Light Co.—Amendment—Staggers Act*, 365 I.C.C. 983, 990-91 (1982), petition for review pending in *Arkansas Power and Light Company* v. *ICC*, U.S.C.A., D.C. Cir. Nos. 82-1484 et al. See also Conf. Rept. 90.

[42] At the same time, water or coal slurry substitution will act as partial price restraints.

[43] See comments of the Department of Transportation, pp. 7-8.

[44] The Coal Exporters Association (comments, p. 19) asserts that deregulation will remove the statutory protections intended to keep rail rates to the rivers for export coal at reasonable levels to the detriment of rail/water competition. But the association itself concedes (p. 19) that "even under regulation certain of the railroads have kept their rates for export coal to the river so high as to preclude competition by the water carriers." Moreover, it recognizes (p. 20) that nonrailroad entities, are constructing or proposing coal ports to compete with the ports owned and operated by the railroads. Accordingly, we conclude that continued regulation will not guar-

ratemaking following this exemption will create a transportation system tailored to suit "the needs of the public and the national defense." 49 U.S.C. 10101a(4). As discussed above, an increase in contract ratemaking will enable railroads to develop operating strategies and make capital improvements on a long-term basis. The resulting strengthening of our transportation system will aid our national defense posture by providing our trading partners secure supplies of energy.

Two principal arguments are made that the NTP requires our continued regulation of export coal. We are not persuaded by either one. First, Commerce and State predict that deregulation will result in rates that could depress export coal volumes, jeopardizing our international energy policy, which favors the use of coal by our allies. We do not share their fears because we disagree with the premises of their economic analysis. The two Departments assume that railroads will uniformly raise their rates, and that those uniform rate increases, when added to what the Departments apparently see as the immutable coal producers' share of the present economic rents, will result in delivery prices above the cap set by the competitive world market. The railroads, however, have repeatedly stated that they intend to engage in selective, rather than uniform pricing. We credit the railroads' statements because they make economic sense while we believe the Departments' views are based on the misconception that the parties, especially the railroads, will use the freedom to act irrationally.

The railroads want increased contracting for export coal rates. Such contracts, negotiated with various shipper interests under varying circumstances, by their very nature are unlikely to produce uniform price increases.

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antee the rail/water competition that shipper interests desire and that the competition of coal ports—and the fear that more may be developed—will effectively constrain unreasonable railroad pricing to the ports.

More importantly, the Departments never explain why they think railroads will blindly impose massive rate increases and thus reduce volume if the railroads' aim is to maximize revenues. Because this traffic is already profitable, we think it is far more likely that the railroads will attempt to help maintain or increase present export volumes, while striving to maximize their revenues on each particular movement.

Given this conclusion, we see no basis for continuing to shield coal producers from fair competition by the railroads. The producers' or transshippers' share of the economic rents from export coal should reflect their economic power, and should not rest upon the fact that another key element in the process—the railroads—are subject to restraint unnecessary in a competitive environment. Thus, the railroads will not be able to price export coal beyond the reach of foreign consumers, except at ruinous cost to themselves. Because we expect the carriers to act rationally, it simply is not reasonable to forecast a decrease in the amount of coal exported as a result of this exemption. Accordingly, an exemption will allow our allies, especially the countries of Western Europe, to place greater reliance on American coal, thus enhancing our common security. Deregulation is consistent with the President's Coal Export Policy Statement because it removes regulatory delay and uncertainty from coal transportation pricing.

Second, we find no basis for the generalized arguments [45] that the exemption might result in unlawful discrimination—or competitive practices involving water carriers—that are unfair, destructive, predatory or otherwise unlawful. See 49 U.S.C. 10101a(13). In *American Trucking Associations* v. *ICC*, *supra*, the court rejected the virtually identical assertion that the TOFC/COFC exemption could lead to practices proscribed by section

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[45] See comments of Coal Exporters Assn., pp. 74, 78-83.

707 [46] of the Staggers Act and 49 U.S.C. 10741(b).[47] It properly explained: [48]

> * * * the exemption does not make lawful any 'competitive practice that is unfair, destructive, predatory or otherwise undermines competition.' Rather, * * * it simply exempts the railroads from regulation, thus allowing them to compete. Should the railroads develop sufficient market power to engage in the kinds of destructive competitive practices referred to in Section[s] 707 [and 1074(b)] the exemption will be revoked and regulation restored.

In other words, it is clear that where, as here, exemption is consistent with certain elements of the rail transportation policy, our authority to revoke exemptions in 49 U.S.C. 10505(d) provides sufficient protection against possible future action that could violate the act.[49]

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[46] Section 707 provides:

> * * * with respect to the relationships between water carriers and rail carriers, none of the amendments made by this Act shall be construed to make lawful (1) any competitive practice that is unfair, destructive, predatory or otherwise undermines competition and that was unlawful on the effective date of this Act; or (2) any other competitive practice that is unfair, destructive, predatory, or otherwise undermines competition.

[47] Section 10741(b) provides:

> A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port or type of traffic to unreasonable discrimination.

[48] *American Trucking Associations Inc.* v. *ICC*, *supra*, 656 F.2d at pp. 1123-24.

[49] Congress did not expect us to be able to predict with certainty the effects of every exemption decision. *Id.* at p. 1127. To the contrary, the Conference Report (p. 105) explicitly states:

> The conferees expect that * * * the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.

In any event, the harm alleged—proposing rates intended to channel traffic to the railroads' own coal piers and away from new coal port facilities being developed by the producers [50]—is not a violation of the discrimination statute. Section 10741(b)—which prohibits only "unreasonable" discrimination—clearly does not mandate identical treatment of all similarly situated localities and shippers. In fact, the practice of charging a lower rate for single-line traffic to a port than for joint-line service from a mine origin area to a port served by other carriers has been in existence for more than 50 years.[51] The lower single-line rates reflect the very different transportation circumstances involved and the advantages of handling traffic in single line as compared to joint-line service.

Congress in the Staggers Act retained the right of ports to complain of unjust discrimination.[52] But the protection of port interests no longer is "at the heart of the national transportation policy." [53] To the contrary, Congress explicitly stated that "claims of unjust discrimination may not be used to hamper the development of sound economic rate and service relationships." [54] Moreover, it explained [55] that the Commission should—

> * * * exercise its remaining power under Section 10741 only where it is needed to prevent abuses of market power where discrimination cannot be justified by differences in demand for services or costs.

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[50] Comments of the Coal Exporters Association, pp. 82-83.

[51] See Supp. N&W-Chessie, pp. 30-31.

[52] In other areas, the Commission authority to remove discrimination was severely circumscribed. See 49 U.S.C. 10741(d)-(f).

[53] See comments of Coal Exporters Ass., p. 79.

[54] Conf. Rept. at p. 104.

[55] *Id.*

Even under regulation a rate will not be labeled discriminatory simply because competitive conditions naturally favor some shippers (or ports) relative to others.[56] Thus, shipper interests have not shown and cannot show that regulation is required to prevent discrimination or practices that are unfair, predatory or destructive to water carriers.

In sum, for the reasons discussed above we conclude that continued regulation of export coal is detrimental to the rail transportation policy and that exemption will be beneficial to the railroad industry, the export coal industry, and the Nation.

B. *Regulation is not Needed to Protect Shipper from the Abuse of Market Power*

The Staggers Act directs us to grant exemptions wherever regulation is not needed to prevent abuses of market power. 49 U.S.C. 10505(a)(2). Thus, the issue is not whether deregulation will give the railroads *some* market power but whether we conclude that an exemption will result in abuse. We can not reach such a conclusion here.

At the outset, we point out that we may make a section 10505(a)(2) finding even where there is no effective competition.[57] Therefore, it is significant that in this case the parties have firmly established the strong worldwide competition for our export coal. As has been made abundantly clear,[58] coal from the United States participates in a world-market made up of many large sophisticated buyers who can obtain their coal from several sources. Given those many sources, and the fact that the

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[56] See *Nueces County Navigation District No. 1* v. *ICC*, 674 F.2d 1055 (5th Cir.), cert. denied, November 28, 1982.

[57] Conf. Rept., p. 105. See *American Trucking Associations, Inc.* v. *ICC, supra*, 656 F.2d at n. 18, pp. 1125-26.

[58] See, *e.g.*, comments of the Western Railroads and comments of the DOT.

United States has but a relatively small share of the world market, American rail carriers can not by unilateral action force up the delivered price users will pay for American coal. This fact means that the issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

Within this pricing arena in which the world delivered price of coal is highly constrained by competitive market forces, we are confident that the railroads will not price their services so as to reduce American coal production. Opponents argue that railroads would accept the loss of some export coal since the loss would be more than offset for the railroads by an increased return on each ton of coal moved at higher rates. However, opponents' belief is the result of their mistaken assumption of uniform rate increases, *e.g.*, in the NERA model, the railroads are assumed to act like simple monopolists. A simple monopolist must accept the loss of one customer's business in order to raise prices to its other customers. The railroads, however, have persuaded us that they are not likely to act as simple monopolists but will price their services according to the cost and demand characteristics of each particular mine in order to retain the traffic. The railroads have demonstrated that it is not in their economic interest to raise rates to the point where the traffic stops moving. Price competition for export coal is such that even a 10-percent increase in the delivered price of American coal can be the difference between obtaining a market or losing it entirely.[59] And it is in the railroads best interest to ensure that American coal continues to be sold abroad.

The railroads are highly capital intensive and have a large amount of capital invested in the coal industry on

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[59] Interagency Coal Export Task Force Report, p. 6.

which there will be no return if coal is not produced and moved over their lines. Moreover, the railroads depend upon increasing volumes of export coal to amortize their heavy investment and finance new construction. In sum, the railroads' interests closely approximate those of the mines they serve. Rail rates may increase under the exemption, but they are unlikely to increase sufficiently to reduce the volume of export coal significantly or to force the mineowners into a situation where their return on investment would be inadequate.

It is generally conceded that the availability of alternative sources of delivered coal will protect foreign buyers from abuse by the United States.[60] However, as previously noted, those opposed to exemption assert that the railroads will have undue and oppressive market power over domestic coal producers because most coal mines are served by but a single railroad.

We think these fears are misplaced. First, as we discussed above, coal exporters are an extremely concentrated industry with sufficient bargaining leverage to prevent unreasonable pricing by the railroads. Thus, we are unwilling to accept the coal producers' argument that the railroads if exempted will appropriate all the economic rents on export coal. Second, for most coal export traffic, the railroads' direct customer is not the overseas buyer or the operator of a single mine but a large broker or transshipper often who takes responsibility for assembling an order of coal and guaranteeing delivery.

The transshippers often own their own mines (which generally are located in several producing regions of the country) and make purchases from small independent mines.[61] They are able to fill an order from a variety of mines served by different railroads because export

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[60] See particularly comments of Coal Exporters Association, pp. 36-37; comments of DOT, pp. 10-11.

[61] Supp. N&W-Chessie, pp. 8-13.

coal contracts are rarely mine specific.[62] The railroads' awareness that transshippers are not bound to use the services of any one carrier gives transshippers considerable leverage in their negotiations.

There is also severe interregional competition for export sales. Motor carrier, and particularly, barge competition exists, creating rail/water or rail/truck alternatives. The potential for development of coal slurry pipelines adds to the transportation alternatives. Finally, purchasers have the option of considering other sources of energy, making product competition an important factor. The world price of oil is an essential factor affecting the price and demand for export coal. Consumers may also turn to other alternative energy sources such as nuclear power and natural gas. This rigorous competition substantially restrains railroads from abusing their market power and engaging in monopoly pricing.[63] Moreover, even in the rare instance where a particular carrier might exclusively serve a small shipper that produced and sold export coal from a particular mine under a long-term contract,[64] it would be contrary to that carrier's interest to attempt to abuse its market position by raising rates to the point where the traffic stops. Unreasonable rates would discourage foreign buyers from making future coal purchases from mines served by that carrier

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[62] Comments of the DOT, p. 11.

[63] There is strong evidence that competition results in reasonable —and frequently reduced—rates, as discussed above. Conrail has reduced its export rates on so-called captive coal mine traffic, and N&W and Chessie have not taken several general rate increases on export coal. Supp. N&W-Chessie p. 6. Finally, it is significant that with the exception of a section 229 complaint, no complaints challenging western export coal rates have been filed. Comments of Western Railroads, p. 16.

[64] Absent such a contract, of course, the producer could sell domestically, thus obtaining the benefits of our regulation of maximum reasonable rates. Up until now export coal has constituted only a small percentage of the United States coal shipped.

(for fear of similar rate actions cutting off supply) and could lead to short-term traffic losses through the substitution of coal from other sources. We adopt the views of the DOT [65] that:

> * * * although an individual mine may be served by only one railroad each customer is not limited to buying coal from a particular mine. Even if a coal customer is constrained to buy a particular type of coal available from only one source served by one railroad, a coal exporter has the power to direct other portions of its coal export or domestic business to other carriers in order to obtain satisfactory rate and service terms from that railroad.

In conclusion, the exemption of export coal will place the parties involved in exporting coal on an equal footing,[66] and will leave the producers and carriers free to negotiate a division of available profit or economic rent. We expect that, following exemption, the railroads will differentiate among the mines they serve and set their rates in an area between an individual mine's longrun marginal cost of extraction at the current cost of capital and the world market price.[67] The railroads have long differentiated their rates among the mines they serve and are fully equipped to do so once regulation ends.[68] Al-

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[65] Comments, p. 12.

[66] Of the parties involved (railroads, producers, transhippers and ocean carriers) only the rail carriers are regulated.

[67] Economic rent will be divided in accordance with the relative bargaining power of the parties involved in particular cases. In some cases the shipper will have more leverage; the converse will be true in others.

[68] Sufficient information to permit the differentiation should be readily available, because the individual producer would have a strong incentive to discuss its situation with the railroad and inform it of anything (including its extraction costs as they change over time) which would warrant a lower rate. Should misapprehension lead to too high a rate, temporary suspension of production should result in a rate which would return the mine to market.

though, under exemption, the railroads sometimes may obtain more of the available profit than they currently do, it is in the carriers' long range self-interest to encourage the shippers to expand production. Both they and the shippers have a common interest in bringing to market as much coal as the market will absorb. Regional and world competition and shipper transportation and marketing alternatives, as well as the carriers' rational self-interest, will all constrain the railroads from abusing such market power as they may possess. Regulation, therefore, is not needed to protect shippers from abuse of market power.

Finally, we note that two other important safeguards exist to protect against any abuse of market power. First, exemption will mean the complete removal of all antitrust immunity.[69] Even shipper interests concede[70] that the antitrust laws, particularly section 2 of the Sherman Act, provides assurance that levels of rates and services for exempt transportation do not become unreasonable.

Second, the railroads know that if they engage in an abuse of market power, we may revoke our decision here pursuant to 49 U.S.C. 10505(d) and restore regulation.[71] This will be a strong incentive to the carriers not to abuse their market power even if a particular railroad were to develop sufficient leverage to be able to do so.

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[69] Our exemption decisions traditionally have removed antitrust immunity. See *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 736 (1981). Here, the DOJ has requested the complete revocation of all immunity and the carriers do not object. Immunity will be revoked for all aspects of export coal transportation including the collective setting of car hire charges.

[70] See comments of Coal Exporters Assn. pp. 97-98.

[71] *American Trucking Assn* v. *ICC*, *supra*, 656 F.2d at pp. 1123-24, 1127; *McGinness* v. *ICC*, *supra*, 662 F.2d at p. 857, n. 9. See also Conf. Rept. 105. (The conferees expect that the Commission will adopt a policy of reviewing carrier action after the fact to correct abuses of market power.)

For these reasons, we do not believe that the exemption of export coal transportation will result in abuse of market power by the railroads. Rather, exemption will allow the railroads to respond flexibly to the rapidly changing circumstances of the world coal market and will encourage long-term contracts and the efficiency that negotiated rate-making brings.

VI. Statement of Energy Impact and Environmental Considerations

The Environmental Assessment Statement (EA) prepared by the Commission's Section of Energy and Environment demonstrates that the impacts of an exemption upon the environment and upon energy consumption are not likely to be substantial. We agree with this conclusion.

First, the EA examines the possibility that rate levels will fall under an exemption. An exemption would not significantly increase rail carrier's freedom to decrease rates, however. Under the Interstate Commerce Act, no rate can be found unlawfully low if it contributes to a carrier's going concern value (section 10704(a)(2)). The EA is correct that even without an exemption current rates on export coal could be lowered dramatically without reaching that point, and we do not anticipate an exemption would trigger such dramatic reductions.

The EA next examines possible rate increase levels resulting from deregulation of export coal. Because of the interdependence of domstic and export coal production and transportation, assumptions were made as to both the domestic and the export coal transportation rate. The mine-mouth price of coal was assumed to be constant. The EA predicted what would be the effect on production and transportation of U.S. coal for export given certain assumptions about rail price increases for 1985, 1990, and 1995 using the International Coal Trade Model and the Coal Supply and Transportation Model.

The first case, called the base case, assumes that there would be no increase in rates for either domestic or export coal. Any changes in production and transportation under the base can be attributed solely to other factors—such as projected changes in international markets—and not to the exemption. This case is useful, however, in assessing what changes are likely to occur even without the exemption so that potential changes attributable to the exemption can be isolated.

The second case, the composite scenario, assumes that rates on export coal will increase 10 percent a year. At the same time, rates on domestic coal will increase as allowed in the notice of proposed rulemaking in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines—Nationwide.* The EA determined that if the railroads impose the increases allowed under those guidelines until they reach revenue adequacy, this will result in a weighted average annual rate increase of approximately 5.5 percent.

The EA then concluded that production would be affected as follows:

TABLE 2

Projected coal production, 1985-1995, under alternative rail rate scenarios

Scenario	1985	1990	1995
	Millions of tons		
Base case:			
Export	109	143	175
Domestic	783	910	1,072
Total	892	1,053	1,247
Composite:			
Export	94	113	110
Domestic	778	886	1,034
Total	872	999	1,144

Clearly, substantial across-the-board increases in rail freight rates for export coal will decrease the demand

below levels which would have been expected given stable rates. The EA concludes that under the composite scenario, increased rates could result in production decreases in some localities. But the decrease in production would also result in beneficial impacts on the physical environment such as improvement in air and water quality, reduced energy consumption, reduced noise and accident levels due to decreased mining and transportation activity. The EA shows that the exemption will not generate significant impacts to the physical environment and does not warrant preparation of an Environmental Impact Statement.

We have carefully examined the EA and we generally agree with these conclusions. Nevertheless, we would like to point out that for a number of reasons the EA overstates the environmental impacts which are likely to flow from the exemption.[72] Given the price sensitivity of the export coal market, who do not believe that the carriers will find it in their interest to price above levels which will be lawful under various Staggers Act rate freedoms and coal rate guidelines which are eventually adopted. Even if they do so they will be free to charge different rates to different shippers to the extent which is necessary to retain this profitable traffic. Each shipper of export coal is large enough so that a carrier will have every incentive to examine the effect of a particular transportation rate upon the shipper's ability to compete in the market. And as the railroads have pointed out, the shippers are constantly educating the carriers on this subject. We expect carriers to use their new pricing freedom rationally so as not to price themselves out of the market.

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[72] We would also criticize the EA's composite scenario for not isolating the increases which are attributable solely to exemption. We should not attribute all of the results of these increases to the exemption, but only the impact of the net difference not available under regulation. Obviously, the EA is making certain "worst-case" assumptions.

The EA also assumes that the mine-mouth price of coal will remain constant. We predict, however, that because the demand for export coal is so price sensitive, transportation rate increases will in some cases force suppliers to reduce the mine-mouth price so that the delivered price of the coal to foreign ports remains competitive. As previously discussed in this decision, the exemption will give the carriers greater leverage to deal on a more even basis with mining companies and ocean carriers and transshippers for a relatively greater share of a total profit which is constrained by the competitive world coal market.

In conclusion, even if the worst-case rate increases postulated by the EA occur, there will be no substantial impacts on the environment, or upon energy conversation or efficiency. Moreover, we think the impacts of the exemption projected by the EA are overstated essentially because the EA has not assumed rational behavior on the part of the railroads. Rational behavior would result in the exemption having little or no effect on the volume of export coal movements.

Regulatory Flexibility

Because of our special concern with the effect of this proceeding on small entities, we specifically encouraged them to participate in the oral argument. 47 F.R. 19813 (May 7, 1982). Our Office of Communications took steps to assure wide publicity to small entities, but no substantial participation resulted.

Having reviewed the record, we certify that the exemption of export coal from regulation will not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The purpose and effect of this action is to reduce regulation. It imposes no new reporting or other requirements directly or indirectly on small entities. The impact, if any, will be to reduce the amount of paperwork, tariff filing, and related activities.

Based on the record before us *we find that:*

1. Regulation of export coal is not necessary to carry out the rail transportation policy;
2. Regulation of export coal is not necessary to protect shippers from the abuse of market power;
3. This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

CHAIRMAN TAYLOR dissenting: [73]

I appreciate the majority's summarization of the proponent railroads' comments [74] but feel that perhaps a more neutral approach would provide a better basis on which to rationally decide this important case. Consequently, I will begin and conclude with an analysis of this proposal under 49 U.S.C. 10505 and the legislative intent of the Staggers Act.

The key to assessing the merits of a proposed exemption, insofar as the statutory criteria are concerned, is the recognition that Congress intended the Commission to retain only that measure of regulation necessary to protect shippers, especially captive shippers, from the abuse of market power. Congress specifically expressed

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[73] Before discussing the issues, I want to point out that my opposition to this proposal is shared by Commissioner J. J. Simmons III, who, before leaving the Commission, actively participated in the oral argument and in our deliberations on the merits of the proposal. In the determinative round of voting which culminated on March 3, 1983, and in which a 3-2 majority voted to grant the exemption, Commissioner Simmons voted, on February 28, 1983, to deny the exemption stating: "If I am in the minority and the decision is revised so as to grant the exemption in whole or in part, I wish to be shown as dissenting and having voted to deny the exemption in its entirety." It is my firm belief that Commissioner Simmons' vote is a proper and integral part of the Commission's determination of this matter.

[74] See, *e.g.*, majority decision, ns. 3-8, 10-16, 18-31, 38-40, 51, 58, 61, and 63.

its intent that regulation be continued in those situations where competition is absent and market forces cannot come into play.[75]

The legislative history of the Staggers Act reflects the particular concern of Congress over captive coal traffic. The Senate Committee Report directs the Commission to ensure that coal traffic bears only its fair share of costs, and that "higher rate captive traffic is not unduly burdened." [76] The Conference Committee Report emphasizes "the encouragement and promotion of the transport of coal by rail * * * at rates which do not exceed a reasonable maximum where there is an absence of effective competition." [77] No other commodity was so singled out by Congress.

Accordingly, the central question here is whether, in the absence of regulation, competition in the world and domestic markets would both (i) hold coal rates to reasonable levels, and (ii) encourage and expand the transportation of export coal. My analysis of the evidence, including the comments filed by shippers, receivers, government agencies, and others, together with several reports prepared by the Commission's staff, all lead to the inevitable conclusion that because the necessary competition is not present, neither of the foregoing results will occur if the exemption is granted. Actually, the evidence of record strongly indicates that granting the exemption

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[75] See especially S. Rept. 470, 96th Cong., 1st sess. 43 (1979) which states that the exemption power should not be used "at the expense of captive shippers who have no reasonable transportation alternatives."

Also see the discussion set forth on page 17 of that report indicating the Committee's concern with the magnitude of rate increases on coal movements and the importance of energy considerations.

[76] *Id.* at pp. 7-8. It should be noted, at this juncture, that in expressing its concern for captive coal traffic, Congress did *not* distinguish between domestic and export coal.

[77] H. Rept. 1430, 96th Cong., 2d sess. 80 (1980).

will result in increased rates, together with decreased demand and production. Therefore, the discussion that follows will consider the interrelated effects of exempting export coal movements from all ICC regulation, including rate provisions and car hire/car service obligations.

Turning now to the issues, let me begin by stating that while I agree there is competition in the international coal export market,[78] I am not at all convinced of its relevance as an effective constraint on rail ratemaking for domestic movements from mines to ports. First, the relationship between competition among international suppliers and domestic movements was not directly addressed in our *Market Dominance* proceeding.[79] The Commission there concluded only that potential sources of competition should not be excluded from consideration. Thus, world competition is only one factor among many to be considered.[80]

Of even more importance is the fact that competition in the world export market has only limited relevance in this proceeding. The "source" of such world competi-

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[78] There is considerable question regarding the effectiveness of competition in the movement of metallurgical (met) coal to Western Europe. The U.S. supplies 55 percent of Western European met coal, and is considered the "swing supplied." The major alternative suppliers, Australia (labor problems), Poland (strikes and martial law), South Africa (political unrest and self-imposed quotas), and the U.S.S.R. are not considered reliable substitutes for U.S. coal.

[79] *Market Dominance Determinations*, 365 I.C.C. 118 (1981) (remanded, *Western Coal Traffic League and Its Members, et al.* v. *United States of America*, 5th Cir. No. 81-4257 (Dec. 8, 1982). The court held that the Commission was statutorily precluded from considering geographic and product competition in making market dominance determinations). Rehearing *en banc* granted March 7, 1983; oral argument scheduled for June 6, 1983.

[80] But see, section 205(a)(2)(D) of the Staggers Act which specifically excludes consideration of imported coal as competition in any market dominance determination regarding domestic coal rates.

tion is too remote and takes place entirely outside the U.S. Any analysis must consider the effects of an exemption on both rates and service, and at best, world competition will only set a price cap for U.S. coal in foreign countries, i.e., a maximum price above which coal will not move for export.

The "price cap," however, will neither ensure a reasonable division of profits between the railroads and the coal interests, nor enable the captive shipper to move its coal if a railroad, once freed from its common carrier obligation, determines not to serve such shipper at all or to condition service upon unreasonable rates. That nearly all coal shippers are captive is undeniably demonstrated by the record, which reflects neither intra nor intermodal competition in domestic movements for export coal. Over 95 percent of individual U.S. mines producing export coal are served by just one railroad. In the East, the CSX and the N&W [81] effectively divide the market. In the West, the Union Pacific participates in virtually all export coal movements, while the Atchison, Topeka and Santa Fe participates in a limited number of these movements.[82] Most traffic, especially in the East, is handled by a single railroad from mine to port. Railroads *are* in a position to exact substantial premiums without fear of diverting traffic to other carriers.

There is no effective intermodal competition. Pipelines do not yet exist for the transportation of export coal, and truck competition is not economically practical for large shipments or long distances.[83] Barge transportation almost always involves a prior movement by rail,

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[81] Now a subsidiary of Norfolk Southern Corporation.

[82] At the time the record closed, the Burlington Northern had not developed an export market for its Powder River Basin coal. See text *infra*.

[83] The statistic of the majority regarding the 13-percent truck movements is 13 percent of total coal production. There is no indication of whether any of this is for export.

which makes the railroad indispensable to the water carrier's ability to carry coal. This point has not been lost on the railroads. For example, until last summer, rates on coal movements to the river system were set higher than those to the east coast, thus assuring that traffic moved all rail, and in most instances, to railroad-owned port facilities. However, because the shippers and competing barge lines had recourse under the Interstate Commerce Act, the railroads dropped their rates to the river to the domestic level.[84]

But, under the exemption proposed here, the railroads could effectively eliminate all barge participation in export coal traffic, and thus adversely affect the New Orleans gateway, either by setting a prohibitively high rate for coal movements to the water connecting point vis-a-vis the rates established for all-rail movements, or by refusing to provide any service at all to water-connecting points for export coal movements. The railroads have a powerful incentive to eliminate barges as a competitive alternative so that more and more export coal will move via all-rail service, often to export coal facilities owned and operated by the railroads. As a result, insofar as the barge alternative is concerned, the export coal exemption can only be regarded as truly anticompetitive.

Moreover, geographic and product competition within the United States is neither a counterbalance nor a solution to the problem. The coal producing regions of the U.S. do not compete with each other for most of the export market. According to the railroads' own testimony, the vast coal reserves now available in the Powder River Basin (Montana and Wyoming) are a very long distance from port (over 1,000 miles) and the coal in such reserves is not of export quality, because its energy value is less than 10,000 BTUs and it has a relatively high moisture content. The coal from Ohio, western Kentucky,

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[84] See complaint No. 38802, *Water Transport Assoc.* v. *The Chesapeake and Ohio Railway and Norfolk and Western Railway Company.*

and Illinois is not of met quality and has too much sulfur for all but a small part of the steam coal export market. Coal from Colorado, Utah, and New Mexico goes to Japan, where there appears to be some competition with eastern coal. However, these western reserves produce no met coal, and the delivered price to Japan of eastern steam coal is more than $20 per ton higher than the delivered price of coal from New Mexico, Utah, and Colorado. Therefore, competition between the two sources is minimal. Almost all of our steam and met coal exports to Europe move through Atlantic ports.

The premise underlying the argument that export contracts can be freely filed from mines on more than one railroad is also unrealistic. First, export tonnage is frequently a blend of coal from several mines, and many times, some mines are on one railroad, some on another. Second, for a shipper to be able to substitute tonnage from a mine on a second railroad, certain conditions must be met, i.e., the tonnage must be available and not already committed to a long-term contract, the extraction costs must be relatively the same, and the tonnage from the second mine must be technologically substitutable for the tonnage from the first. Shippers point out that the chance for such substitution does not usually occur, especially since the Chessie hauls primarily met coal and the N&W primarily steam coal. Third, there must be no price leadership, in that if one railroad raises its rates, the other will not, or at least not to the same level. It appears highly unlikely that all three of the foregoing conditions would coalesce, and even if they did, the advantage would accrue only to the particular shippers affected. The fact remains that 95 percent of the mines producing export coal are captive to the railroads that serve them.

The argument that big shippers can play one railroad against another (i.e., by substituting tonnage from mines served by more than one carrier) is still less convincing, even were one to ignore the problem of lack of sub-

stitutability discussed *supra*. When a shipper negotiates with a railroad, its corporate affiliation is less important than its access to alternate transportation. There are over 100 companies involved in the export coal trade. Although some of the shippers are large, with connections to still larger entities, only 24 percent of the mines served by the Chessie System and the N&W are controlled by operators having mines on both railroads. As for the West and the Midwest, there appears to be virtually no possibility of substitution between railroads at the present time.

Therefore, contrary to the suggestion of the railroads, the adverse consequences of granting the exemption would not be offset by theorizing that (i) the railroads and the coal suppliers would negotiate as "partners," or that (ii) big shippers could exert more bargaining power than the railroads.

In light of the lack of any form of domestic competition, it cannot be argued that the transportation of coal from mine to port is a joint venture where profits are distributed according to the percentage of equity participation. Instead, such transportation is an undertaking in which the parties' interests are the same only in the broadest sense, i.e., getting the coal to market. However, in the only sense that is germane here, each participant is solely concerned with maximizing its own profit. Because most mines are served by only one railroad, and because many mines may be on that one railroad's line of track, it is perfectly possible for such a railroad to maximize its profit at the expense of one of the shippers it serves. To illustrate, such a railroad could easily recapture business lost at one captive mine from a second mine that has greater production capabilities and/or lower production costs than the first.

To be sure, if coal does not move, neither the railroad nor the coal producer makes any money. However, the magnitude of the loss is not the same for each. For example, each of the two major eastern railroads has over

200 mines on its rail lines. In any negotiation, each mine is bargaining for all of the profit which can be made from that mine. The railroad, on the other hand, is bargaining for profits on only one of several mines that it serves, many of which may be located on the same line of track. Thus, in the negotiating area, only a relatively small share of the railroad's profits will be at risk.

Clearly, the railroad can rely upon the traffic from other mines on its rail lines and the profit from other commodities it carries to mitigate the loss from its failure to agree with a particular mine, and while so doing, the railroad will remain secure in the knowledge that the coal from such mine must move eventually, if at all, and then only over the railroad's trackage. If the mine does not ship, some other mine on the carrier's line may increase the amount it exports, thereby allowing the railroad to gain a share of the profit from that transaction. Because the individual mine has, for the most part, nowhere else to turn, it will be forced to reach agreement with the railroad or not produce coal. Thus, under the scenario contemplated by the proposed exemption, the railroad would be in a strong position to capture most or all of the individual mine's profit, since the latter's rate of return would effectively be determined by the carrier.[85] Furthermore, given a lack of intermodal and geographic competition, even those few suppliers which could exert significant bargaining power would not protect the interests of the many, nor would they have any incentive to protect the interests of their competitors.[86]

Also, it should be noted here that the record is devoid of any concrete evidence in support of the contention that

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[85] The railroads have stated that they will set their bargaining according to the mine's cost of extraction rather than their own cost of operation.

[86] In fact, as some railroads lease coal producing land to mines, the closure of another mine would only serve to increase royalties to the railroad from its own land. See discussion in text *infra*.

regulation imposes a chilling effect upon contracting. Hundreds of coal contracts have been filed with the Commission, and the railroads have not evidenced a single instance where they have lost a contract because a shipper has insisted upon a "regulatory backstop" clause. Nor have the railroads indicated what shippers have asked for such a clause or how many times the request has arisen in negotiations. None of the railroads' shipper witnesses testified that they have demanded a "backstop" clause, whereas the shippers opposing the exemption testified that they had never even heard of a "backstop" clause, much less insisted upon one.

It should be noted too that the railroads already exercise a substantial measure of ratemaking flexibility.[87] The Commission does not have jurisdiction to examine maximum rate reasonableness unless we first determine that a railroad has market dominance over the transportation to which a particular rate applies, 49 U.S.C. 10701a(b)1 and 10709.

Furthermore, in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines, Nationwide* (not printed), decided February 8, 1983, we published a carefully crafted proposal for prescribing maximum reasonable coal rates in instances where railroads exercise market dominance over coal traffic. That proposal reflects the dual concern of Congress that captive coal shippers be protected from abuse and that the railroad industry achieve revenue adequacy.[88]

However, quite apart from the ratemaking flexibility proposed in Ex Parte No. 347 (Sub-No. 1), the railroads

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[87] From 1977 through 1981, the average railroad freight charge increased 65.9 percent while the value of coal, per the f.o.b. mine price, increased only 31.2 percent.

[88] The proposal recognizes the need for differential pricing if railroads are to achieve revenue adequacy, thereby, providing the railroads with broad ratemaking flexibility. The approach taken is one of constrained market pricing.

have stated that they will, given the export coal exemption, engage in discriminatory pricing based on each mine's long-term marginal cost. This discriminatory pricing, as contrasted with differential pricing, will be completely free of regulation and will adversely affect the production of export coal. The natural result of setting rates according to the cost of extraction is to transfer from the mine to the railroad those returns from the production of coal which exceed the mine's long-term marginal cost. A producer who knows that his profits are captive to the carrier has no reason to expand.[89] Appendix A to this dissent sets forth, by example, an illustration of how coal production could be reduced while railroads still maintain maximum returns. In any event, regardless of whether the railroads extract monopoly profits by resort to either simple or discriminating monopoly power, export coal production can predictably be expected to decline over the long run.

Also of importance is the fact that the effects of the exemption extend far beyond profit and loss to coal shippers and carriers. It is impossible to separate out the extensive foreign and domestic ramifications. While the railroads supplied no economic calculation of the effect on the volume of export coal that their actions under deregulation will have, the majority of the comments and the Commission's own Environmental Assessment Statement (EA) support the conclusion that the exemption

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[89] A more efficient coal producer will have lower production costs, and therefore will be able to absorb greater transportation charges while remaining competitive in the world market. At the same time, the less efficient producer will be unable to absorb equivalent transportation charges. Consequently, transportation costs will dictate coal prices, not production. The efficient producer who will be punished by paying higher transportation charges than his less efficient competitor will compete only on an equivalent footing with less efficient producers. Thus, the efficient mine will not have a cushion to decrease its price and compete more effectively, nor will it have the entrepreneurial incentive to expand production in return for increased profit.

and the concomitant rate increases will result in a decline in demand for export coal.

In contrast, section 203 of the Staggers Act (49 U.S.C. 10701a(e)(2)(B)(iii), i.e., the Long Canon Amendment) mandates consideration of the impact of a proposed rate or rate increase on the attainment of national energy goals when the Commission determines whether to investigate certain rate proposals. As explained in the Conference Committee Report, the national energy goals include reduction of dependence on foreign energy sources. Further, "[t]o reduce dependence on foreign energy sources this country must stimulate utilization of its abundant, indigenous coal reserve."[90] Consideration of our national energy goals will no longer be a factor in view of the action taken by the majority in this proceeding.

Domestically, a diminishing demand for export coal translates immediately into reduced growth in production in coal supply regions. In fact, the Commission's EA composite case shows that by 1985, Virginia, Utah, and Colorado will experience a complete loss of all export production directly as a result of the declining demand for export coal brought about by increased transportation rates. The EA also indicates that by 1990, there will be substantial declines in the coal productivity of southern West Virginia, Alabama, and Oklahoma, and that by 1995, New Mexico will lose its entire export coal market. Needless to say, these losses will have a severe adverse impact upon the Nation's balance of trade, upon primary and secondary employment levels, upon local and regional tax bases, and upon the communities and families dependent on those mines which are forced to decrease or stop production.

In addition to the foregoing economic and social effects, a grant of the exemption is in direct conflict with the Administration's efforts to stimulate demand for the

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[90] H. Rept. 1430, 96th Cong., 2d sess. 95 (1980).

export of U.S. coal to our allies in the Pacific Rim nations and in Western Europe,[91] and with the President's policy statement of our allies that foreign consumers be allowed complete, open, and nondiscriminatory access to the U.S. coal market.[92] Foreign customers are greatly concerned with the stability of pricing and the reliability of supply. The numerous comments forwarded to the Commission from foreign governments and coal purchasers in countries such as Japan, Spain, Brazil, Italy, the Netherlands, and Ireland all express the strong fear that price increases and a lack of stability in the delivered price will reduce the attractiveness of U.S. coal as a reliable source and as an alternative for not only foreign coal, but also for OPEC oil and Soviet gas. Significantly too, these foreign markets, once lost, cannot be easily regained.[93]

Moreover, as recognized by the Departments of State and Commerce and the International Trade Representative, it is important to our national security that both ourselves and our allies have a secure, economic, and competitively priced alternative to unpredictable supplies of imported energy. In derogation of this objective, the

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[91] These actions are part of an integrated effort which includes improvement in port and waterway facilities.

[92] The President's "Coal Export Policy Statement" of July 17, 1981. A foreign purchaser could plausibly conclude that the deregulation of the export market, while leaving domestic coal regulated, is a measure aimed at extracting profits from overseas consumers. In fact, the railroads have confirmed this impression. See the transcript of oral argument, Tr. 54, 55, 218; see also the Reply Verified Statement of Gould and Landes at pp. 7-8: "Higher prices for delivered coal would be borne by foreign consumers, while U.S. railroads would gain. * * * [T]his transfer makes the U.S. better off." Such a conception of the nature of the U.S. commitment to coal exports is clearly not consonant with the President's policy statement.

[93] For a complete discussion on this point, see text *infra*, at "Revocations," and the comments of the Departments of State and Commerce and those of foreign purchasers.

proposed exemption, by shifting profit from producer to carrier and precipitating a long-term decline in coal exports, would undercut a key element of U.S. international energy policy,[94] impair the health of our mining industry, jeopardize the jobs of thousands, and substantially weaken, if not eliminate, a potentially important factor in the restoration of a favorable balance of payments for the United States.

In addition to the glaring defects in the majority's position on the effects of "competition," this decision is also subject to numerous oversights and procedural deficiencies.

ANTITRUST IMMUNITY

Certainly no exemption should be authorized which retains antitrust immunity. However, let no one assume that the antitrust laws will protect shippers from the abuse of market power. The most that the antitrust laws can do is to prevent collusion among existing competitors. The holder of a lawful natural monopoly generally is free to set its rates and provide its services in the manner deemed most profitable.[95] The carriers appear to be immune from antitrust actions with respect to any traffic, such as export coal, which has always been captive. The courts cannot provide the regulatory supervision necessary to curb abuses.

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[94] See also United States Department of Energy, Interim Report of the Interagency Coal Export Task Force, January 1981 (DOE/FE-0012), which stated that the role of the United States in future coal trade "depends upon the buying strategies of the consuming nations, the policies and prices of competing exporters and the actions taken by the United States to maintain reasonable prices, prompt delivery and dependable quality."

The Commission's EA also predicts, at p. 51, that "U.S. shares of both the European and Pacific Rim markets are projected to decline significantly."

[95] *Berkley Photo, Inc.* v. *Eastman Kodak, Co.*, 603 F.2d 263, 297 (2d Cir. 1979).

THE RAILROAD'S MODIFIED PROPOSAL

Recognizing the serious problems inherent in an across-the-board exemption, the N&W, in a later pleading, proposed that any exemption be limited to the rate regulations of 49 U.S.C. 10701-10712. This would have retained Commission jurisdiction in such critical areas as car hire and service (especially 49 U.S.C. 11126), the commodities clause (49 U.S.C. 10746), the war power clause (49 U.S.C. 11128), the contract rate provisions (49 U.S.C. 10713), and the common carrier obligation (40 U.S.C. 11101(a)) to name only a few. However, the majority decision rejects this modified proposal, but since the N&W's suggested limitations have been addressed only summarily in the majority's analysis of the national transportation policy, it is difficult to determine if the impact of their removal was seriously considered.[96]

For instance, as discussed *supra*, with the demise of the common carrier obligation, what incentive is there, in these days of unit trains, for a railroad to drop and pick up a few cars at the site of a small family-owned mine in Appalachia? Although many such mines have already been shut out of certain export markets because of high transportation costs (which can run as high as one-third to one-half of the purchaser's costs), the few that remain will face inevitable exclusion from such markets by virtue of the exemption granted herein.

Congress specifically recognized the problem of obtaining cars in 49 U.S.C. 11126(a), which requires railroads to make "a reasonable distribution of cars for transportation of coal among the coal mines served by it [the railroad] whether the mines are located on its line or are customarily dependent on it for car supply." Thus, by imposing an obligation to supply cars, in tandem with

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[96] For a contrast, see the Commission's recent decision exempting boxcars, wherein these questions were discussed at length and it was emphasized that jurisdiction was being retained to protect against shipper abuse.

the common carrier obligation and various rate regulations, Congress sought to ensure continued participation in the market, not just for mines that a railroad chooses to serve, but for *all* mines.

Did the majority also consider the impact of removing the commodities clause limitation on the exemption granted? Railroads own enormous amounts of coal, most of which they received in the form of grants from the Government. These railroads (i.e., the Burlington Northern, the Union Pacific, and the Santa Fe) own over 16 billion tons of coal reserves, which approximates 25 percent of the total non-Federal coal reserves located in the Western States. Recently, these railroads have been active in marketing their coal, but the commodities clause, 49 U.S.C. 10746, prohibits them from transporting it. However, the exemption granted by the majority will void the statutory prohibition against such railroads directly transporting their own coal to an export gateway. As a result, with the exemption, the railroads can determine which mines will receive service, and thus they could decide that export coal will come only from their own mines. Under the exemption, it would appear that coal-owning railroads can now mine their own coal and haul it in their own cars, over their own tracks, to their own piers for export.[97] As a consequence, independent coal producers will instantly, upon the exemption becoming effective, be confronted with a legal vertical monopoly against which it will be very difficult to compete.

Lack of an Environmental Impact Statement

In the majority's unexplained rush to issue this decision, the required environmental impact statement (EIS) and energy impact statement (SEI) have both been omitted. The purpose of an EIS and a SEI is to enable the Commission to consider fully the environmental and

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[97] Some railroads are currently investigating the desirability of entering into the ocean portion of export coal transportation.

energy impacts of its decision. However, when voting was concluded in early March and the exemption was granted, the Commission had nothing before it on this issue.[98] Ironically, however, also in March of this year, the entire Commission issued a notice of intent to prepare an EIS in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines—Nationwide, supra.*[99] That notice found that a significant environmental effect arises out of any major change in coal rate regulation, and as a result, several possible effects of coal rate increases were listed. In fact, the EIS in Ex Parte No. 347 (Sub-No. 1) stated that it would "consider the effect of the proposed action on potential overseas demand for domestic coal," and on how the proposed rate guidelines "might * * * affect their other important considerations such as export coal policy."

Thus, the Commission has recently acknowledged, as a matter of public record, that the export coal market and the environmental manifestation of any changes in that market are not economically isolable from the domestic coal transportation market. The National Environmental Policy Act (NEPA) requires federal agencies to produce a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 318-19 (1975).

The logic of the above NEPA analysis also applies to the requirements of the Energy Policy and Conservation Act (EPACA), 42 U.S.C. 6201 *et seq.*, which requires the Commission, where practicable, to include in any major regulatory action a statement of the action's probable impact on energy efficiency and energy consumption.

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[98] The threshold environmental analysis was prepared in March 1982 and recalled by the Director of the Office of Transportation Analysis in November of 1982, because the analysis was insufficient to reach a conclusion that no significant adverse impacts were likely.

[99] 49 F.R. 9706, March 8, 1983.

42 U.S.C. 6362(b). A SEI is certainly indicated here, because the exemption affects coal rates, because the Commission's regulations generally require a SEI in rulemaking proposals affecting carrier operations, 49 CFR 1106.5(a)(9), and because the Commission acknowledged potential energy impact in the export exemption rulemaking notice. 46 F.R. 44532 (Sept. 4, 1981).

The Commission has thus formally acknowledged that as to energy consumption and environmental considerations, the export coal market is inherently intertwined with the domestic market. Yet, to avoid preparing an EIS in this proceeding, the majority has found that exempting export coal movements from regulation is not a major Federal action significantly affecting the quality of the human environment or the consumption of energy. Such a finding is manifestly indefensible!

The environmental assessment statement (EA) on which the majority's above conclusion is based is seriously flawed and incomplete.[100] First, the EA is based entirely on the assumption that the only effect of the export coal exemption will be an increase in rates.[101] While I certainly agree that this will be the primary result, the possibility of selective decreases, especially on movements from railroad-owned sources, combined with service discontinuances to others, cannot be discounted. The purpose and result of such selective decreases would be to shift supply sources from current producers to railroad-owned mines. Such a direct manipulation of the supply market, while perhaps a reasonable reaction on

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[100] The instant EA, which was prepared subsequent to the March 3, 1983 decision to grant the exemption, warns that impacts are "discussed in general terms because of (1) the absence of knowledge concerning the exact location of extraction activities, (2) the lack of adequate methods to quantify impacts, and (3) the absence of precise or consistent information * * *."

[101] "[We] have further limited our analysis to a study of the impacts of future rate increases." EA at p. 2.

the part of the railroads to a continuing coal surplus, could only be accomplished if all regulations were removed. Therefore, the failure of the EA to address the effects of decreases in rates and the resultant shifts in supply sources is a major defect.

Also, the assessment addresses only indirectly the relationship between export and domestic markets. Export coal rates (and delivered prices which include those rates) have a clear "secondary impact" on the domestic coal market and coal production in general. This secondary impact flows, in part, from the fact that the amount of coal exported can affect the quantity and price of coal available for domestic use, as well as the price at which railroads would be willing to move domestic coal. These effects, in turn, help determine whether domestic coal users will switch to alternate fuels. Thus, while the domestic environmental effects of exempting export coal may not be as direct as those resulting from the Commission's proposed guidelines in Ex Parte No. 347 (Sub-No. 1), they are, nevertheless, closely related and reasonably foreseeable. See 40 CFR 1508.8. Under NEPA, an agency must discuss all such secondary impacts having significant adverse environmental effects. See, for example, *South Louisiana Environmental Council* v. *Sand*, 629 F.2d 1005, 1016 (5th Cir. 1980).

Because of the limited rate increase scenarios studied in the EA, I can only conclude that its overly broad findings are not supported by reasonable evidence. The fact of the matter is the majority has not fulfilled its statutory responsibility to produce an EIS. Instead, the majority has opted for the EA, and as a result, the decision to grant the exemption is based, in part, on a faulty and incomplete study.

REVOCATION

The ability to reimpose regulation by revoking the exemption under 49 U.S.C. 10505(d) has definite practical limitations in this proceeding. Even if the exemption

were in effect for only a relatively short period of time, there would still be great potential for the occurrence of serious damage. The railroads could absorb shippers' profits, thereby causing some producers to go out of business. Plans for expansion could be canceled or postponed at the very time a demand for increased national coal production is emerging. Also, coal contracts are often long-term commitments, and the parties to many actual or potential coal export contracts or rail transportation agreements could irrevocably change their positions and suffer losses that could not be recouped.

Besides, authorizing an exemption on the basis that we can reimpose regulation is clearly unwise when the potential for serious abuse of market power, the likelihood of decreased U.S. coal exports, and the possibility of grave and irretrievable social, economic, and political damage is so apparent.

LIMITED EXEMPTION

Without question, the exemption proposed should definitely have been denied. In so doing, however, I would have urged the railroads to refile for a partial exemption seeking the establishment of a special zone of rate freedom for export coal movements. Such a zone could have had a fluctuating base and ceiling tied to an index related to the current price of coal.[102] Within the moving zone, the railroads would have been free to set rates without regulatory interference. The Commission could have been relatively certain that rates set within the exempt zone would not involve an abuse of market power because of the relationship established between the index and the zone.

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[102] The zone's fluctuations could have been based on a percentage relationship to a recognized index, such as the Railroad Freight Price Index, published by the U.S. Department of Labor's Bureau of Labor Statistics (developed by BLS in cooperation with the Commission's Office of Transportation Analysis) or the Department of Labor's Producer Price Index for Coal.

While the proposal and justification of any particular index would have been up to the proponent railroads,[103] the point is that such a zone of rate freedom would have provided the benefits sought from this exemption without its overwhelming detriments. Regulatory burdens would have been reduced, railroads would have had the ability to respond quickly to changing market conditions, and the Commission would have been in a position to fulfill its statutory duty to protect shippers, when necessary, from an abuse of market power.

SUMMARY

This discussion has now come full circle and ends where it began, with the exemption statute itself. 49 U.S.C. 10505 requires that the Commission, using the guidelines established by the Staggers Act, must make two findings. First it must find that the proposal is either of limited scope or will not result in an abuse of market power. Then, the Commission must analyze the expected results of the exemption and find that they compare favorably with the goals of the National Rail Transportation Policy (NRTP).

A simple juxtaposition of the above criteria and the facts and evidence presented in this proceeding shows them to be inalterably incompatible. Certainly rail transportation of export coal is not a matter of "limited scope." No single commodity (other than "coal, all types") comprises more than export coal's traffic share of the railroad industry's annual originating carloads.[104]

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[103] The use of an index for these purposes is not new. Congress adopted a similar approach for the motor carrier zone of rate freedom (49 U.S.C. 10708(d)(3)(B)) which establishes a ratemaking ceiling for the zone based on "the percentage change in the Producers Price Index, as published by the Department of Labor, that has occurred during the one-year period prior to the effective date of the proposed rate."

[104] At the five-digit commodity coal level, the portion of annual carloads represented by export coal is among the highest of all individual commodities. In 1981, for instance, over 93 million tons of coal were moved for export to U.S. ports, in over one million cars.

Export coal involves the shipment of millions of tons of coal worth millions of dollars. No one has made a serious attempt to characterize this exemption as "limited in scope."

More relevant to this proceeding is the alternate standard of whether the exemption will result in an abuse of market power. Based on the record, I cannot find that where undue concentrations of market power already exist due to the near vacuum of any form of domestic competition, it is unnecessary to protect captive shippers of export coal from an abuse of market power. The exemption will not improve the captive shipper's lot but will only remove what little competition and bargaining ability remains. More specifically, the exemption will impair the balance between shipper and carrier interests that Congress so carefully sought to preserve through the reasonable rate and service provisions of the Staggers Act.

Turning now to the most important criterion of all, i.e., the NRTP of 49 U.S.C. 10101a, it must be remembered that this policy has a considerably broader purpose than the improvement of a railroad's profits. The real objective is the maintenance of our rail transportation system for the benefit of all who are dependent upon it. Therefore, such policy mandates a consideration of the whole rail transportation system and the needs of not just the carriers, but also the shipping, receiving, and consuming public. Although the Commission's regulatory reins can and should be loosened or eliminated whenever practicable, caution must be taken to see that reform proceeds in a systematic manner after a careful consideration of all affected interests. Competition and reliance upon the marketplace are important goals of the NRTP, and to achieve these goals, parties must have relatively equal bargaining positions. Where, as here, one party holds monopoly power, some regulation of that party provides the leverage needed to maintain equilibrium in the marketplace.

The consequences of granting the exemption herein proposed will be a distinct lessening of competition, distortion of the demand for services, unreasonable costs for captive products (thereby imposing an artificial limit on the output of those products), and a serious misallocation of resources. Equally grave are the negative effects the exemption will have on our economic and social well being, on our national security, and on our foreign policy. These results violate all the provisions of 49 U.S.C. 10101a, the object of which is to preserve and improve our rail transportation system so that it may better serve those who use it. Instead of giving the railroads an opportunity to seek a reasonably limited exemption that would have enhanced our transportation system, the majority has, by approving the total exemption, greatly impeded the achievement of the goals set forth in the NRTP.

As a result, it is regretful but true that only those who yearn for the overly regulatory days of yesteryear will gain any real comfort from the majority's blatant disregard for the policies of Congress and the Administration.

APPENDIX A

Hypothetical effect of Eastern Railroads' market power over domestic shippers on year 2000 steam coal exports to Europe assuming a constant port price for coal

F.o.b. pier price	Mine-mouth price	Rail rate (1) - (2)	Average rail net revenue (3) - 4.20	Volume (2) - 34.96 / 0.03198	Total rail net revenue (5) x (4)
(1)	(2)	(3)	(4)	(5)	(6)
	1980 dollars per ton			*Millions of tons*	*Millions of dollars*
48.00	39.60	8.40	4.20	145.1	609
48.00	[1]39.30	[1]8.70	4.50	135.7	611
48.00	[1]39.00	[1]9.00	4.80	126.3	606
48.00	38.00	10.00	5.80	95.1	552
48.00	37.00	11.00	6.80	63.8	434
48.00	36.00	12.00	7.80	32.5	254

Note: This table by National Economic Research Associates (p. 24 of December 21, 1981 Verified Statement) redone assuming a multiple of 2.5 instead of 5 to compute marginal extraction cost.

[1]Two mine-mouth price/rate levels have been added in order to pinpoint the profit-maximizing rate.

VICE CHAIRMAN STERRETT AND COMMISSIONERS ANDRE AND GRADISON commenting:

In view of the significance of this case and the fact that it will be litigated, we believe it is important to emphasize that all statutory requirements and Commission procedures have been met. A brief history may serve to clearly detail the voting and review process that was followed.

On March 3, 1983, a majority of the Commission voted to reject the draft decision which denied the petition for exemption in this proceeding. That decision was prepared and circulated at the direction of the Chairman. In making a determination whether to approve or reject the circulated draft decision, each Commissioner had the benefit of the entire record including information addressing economic, legal, regulatory and environmental issues, and each was free to vote based on his or her consideration of the evidence. However, no final vote could be taken on the exemption petition until a new decision was drafted which effectuated the Commission's determination. Thus, in response to the majority's vote, the staff prepared a new draft decision which approved the exemption petition. The environmental assessment was also expanded to provide greater detail and additional analysis. Our final decision was therefore reached on the basis of the revised draft, the expanded assessment, and the complete underlying record.

The procedures followed in preparing the final decision and environmental assessment were entirely consistent with the statutory requirements and Commission procedures and gave appropriate respect and consideration to the rights and viewpoints of all parties.

It is ordered:

1. Based on the statutory findings we have made under 49 U.S.C. 10505, export coal moving through United

States ports including Great Lakes ports is exempt from the requirements of 49 U.S.C. Subtitle IV.

2. Interested persons are invited to submit comments within 30 days on the question of whether the transportation of export coal by railroad to Canada and Mexico should be exempted.

3. This decision is effective on September 12, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison. Chairman Taylor dissented with a separate expression. Vice Chairman Sterrett and Commissioners Andre and Gradison commented with a separate expression.

AGATHA L. MERGENOVICH,
Secretary

[SEAL]

APPENDIX A

Our criticism of the NERA study is that it is based on a simple rather than a discriminating monopoly situation as discussed in the text.

Our next major criticism of NERA's study focuses on NERA's calculation of the marginal cost of extracting coal.

In illustrating how the railroads can limit export volume despite highly competitive conditions in the world market, NERA uses an American coal supply function estimated by Martin Zimmerman. According to that function, marginal extraction costs rise $0.01279 per ton every time our reserves are depleted by 1 million tons. In using this function for its purpose, NERA multiplies the figure of $0.01279 by 5 to obtain the change in marginal cost associated with the sale of 1 million tons per year. NERA's grounds, not adequately supported, for this multiple is that the average contract term is for 5 years; every block of 1 million tons committed 5 years depletes reserves by 5 million tons and hence raises marginal cost by 5 times $0.01279. We find, however, that even allowing for an average contract term of 5 years, no multiple is justified. In fact, NERA itself apparently reverts to use of the $0.01279 figure—without applying any multiple—in generating empirical estimates of benefits and costs using its World Coal Model. Irrespective of whether a multiple is applied, however, the implied elasticity of coal supply is relatively high. Under such conditions, railroads are unlikely to limit export volume unless the international coal market is insufficiently competitive, which NERA argues but which the railroads strongly deny.

Not only was NERA's analysis flawed in its premise, but its calculation of welfare loss was also inaccurate. In its final statement NERA calculated welfare loss based on projected 1990 export tonnage of 198 million tons. This estimate was clearly unrealistic. In 1981

U.S. coal exports were only 113 million tons. Other independent forecasts come out much lower (*e.g.*, about 145 million tons according to Chase Manhattan). Even these forecasts may be revised downward as the coal glut on the world market persists. NERA also arbitrarily restricted foreign supplies rather than allowing overseas procedures to react to market price signals and expand production. This unexplained constraint on foreign production accounts for at least part of NERA's overstatement of American exports in 1990. At the same time NERA refused to allow railroad rates to increase at all over time under regulation, even though, under the Staggers Act, some increase could reasonably be expected. Overprojection of 1990 coal exports and underestimation of railroad rates under regulation resulted in an inflated estimate of welfare loss.

Another flaw in NERA's initial welfare loss calculation was the estimate used for the price elasticity of demand for American imports. NERA adopted the figure of -0.54 from Houthakker and Magie, *Income and Price Elasticities in World Trade*, 51 Review of Economic and Statistics, 111 (May 1969). One of the railroads' witnesses, Professor Arnold C. Harberger, points out that Houthakker and Magie recalculated this estimate because of econometric deficiencies in the original. The revised estimate is -1.03. The significance of a higher demand elasticity for imports here (demand elasticity being a measure of sensitivity of demand, the quantity demanded, to price change) is that less of a percentage change in the exchange rate is required for the foreign exchange and commodity markets to adjust to the cutback in American coal exports. In table 2 of Harberger's statement, the effects of changing different combinations of export and import elasticities are shown. A change only in the demand elasticity for U.S. imports from -0.54 to -1.03 reduces NERA's projected welfare loss by about one-third.

Witness Harberger also takes exception to the other elasticity measures used by NERA, but the Houthakker and Magie estimate is the only one with respect to which he provides sufficient empirical basis to support a revision. Professor Harberger also disputes that the dollar reduction in proceeds from export coal sales can be equated, as NERA does, with the increase in trade deficit. Harberger is technically right. The drop in coal exports would be expected to free resources for use in other export sections and might dampen import demand, but these indirect effects may be infinitesimal, since they would likely be spread over the whole economy, not just the export/import sector.

Under guise of responding to the Commission's request for further information regarding the export coal industry, NERA sought to rehabilitate its study. Although its submission is clearly a reply to a reply and thus violates our Rules of Practice (rule 1104.13), no one moved to strike NERA's supplemental statement, and we have considered it in the interest of a more complete record. In its supplemental statement, NERA corrected two of the deficiencies in its earlier presentation. It reduced its U.S. export forecast to 158 million tons and adopted -1.03 as its demand elasticity for American imports. Had it made *only* these changes, it would have strengthened its case. However, at the same time, NERA made *other* changes in its model. It substituted higher rail marginal cost estimates (while inexplicably, projecting more, rather than less, income for the railroads). It also *reduced* the elasticity of coal demand. Neither of these changes was supported. The reduction in the elasticity is in precisely the opposite direction from what the weight of the evidence in this proceeding plainly shows—that the world coal market is acutely competitive and that demand elasticities are higher (not lower) than originally projected by NERA.

NERA also attempted to modify its model to reflect more intramodal competition than it had originally projected. However, the algebraic formulation of its duopoly model fits more its original hypothetical example of railroads acting as indiscriminant independent monopolists than as discriminating duopolists, which is more likely to be the case following exemption. Not surprisingly, NERA's duopoly model produces results little different from its earlier monopoly projection.

NERA does not disclose the limits of the model on which its computations are based. The railroads requested this information, but NERA refused to supply it. NERA's numerical conclusions cannot, therefore, be independently verified.

In sum, NERA's original model was seriously flawed. In correcting its errors, NERA made other mistakes. The fallacy in NERA's premise, as well as its miscalculation of the welfare effect resulting from exemption, preclude our accepting its analysis.

APPENDIX B

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APPENDIX C

Estimated historical steam coal flows (mst)

	U.S.	Australia	South Africa	Western Canada	China	U.S.S.R.	Poland	West Germany/ United Kingdom	Other/ unidentified	Total imports
Western Europe:										
1979	7.3	4.0	22.3	0.6	-	1.7	20.3	11.9	-	68.1
1980	14.1	4.5	23.3	1.7	-	1.5	18.0	9.8	-	72.6
Japan:										
1979	0.1	1.1	0.1	+	0.3	0.2	-	-	-	1.8
1980	1.0	3.9	0.3	0.4	0.7	0.2	-	-	-	6.5
Other Pacific Rim:										
1979	-	0.8	-	0.5	?	-	-	-	-	1.3
1980	0.7	1.2	0.3	0.7	0.5	-	-	-	-	3.4
Canada:										
1979	11.6	-	-	-	-	-	-	-	-	11.6
1980	10.8	-	-	-	-	-	-	-	-	10.8
Other FME:										
1979	0.4	1.0	-	-	?	-	0.1	-	-	1.5+
1980	0.8	1.1	?	?	?	-	?	-	0.7	2.6+
Total[a]:										
1979	19.4	6.9	20.4	1.1	0.3	1.9	20.4	11.9	-	84.3
1980[b]	27.4	10.7	23.6	2.8	1.2	1.7	18.0	9.8	0.7	95.9

[a]Excludes Eastern Europe.

[b]Coal trade information from a given importing country is rarely consistent with the information from the corresponding exporting countries. The information may differ with respect to both the quality (steam versus metallurgical) and the quantity of the coals traded. Quality differences may arise when metallurgical grade coals are used as steam coals by the importing country. Quantity differences may arise from reporting inaccuracies or the lag between departures and arrivals. During 1980, export/import information was particularly inconsistent. The figures shown in this table represent ICF estimates. These estimates place emphasis on the data of the exporting country for the total level of coal traded to a given country (steam and metallurgical) and emphasis on the data of the importing country for the proportion of shipments which were consumed as steam coals.

Source: *Appalachian Study*—table 4-1.

Estimated historical metallurgical (mst)

	U.S.	Australia	South Africa	Western Canada	China	U.S.S.R.	Poland	West Germany/ others	Total imports
Japan:									
1979	15.6	27.7	2.8	11.6	0.8	2.6	0.6	0.3	62.0
1980	22.0	28.4	3.1	11.6	1.1	2.1	0.4	-	68.7
Other Pacific Rim:									
1979	1.1	4.2	-	0.6	?	-	-	-	5.9+
1980	1.0	3.7	-	0.6	?	-	-	-	5.3+
Western Europe:									
1979	15.5	4.7	0.6	1.0	-	1.5	6.1	10.4	39.8
1980	23.7	3.8	0.4	0.1	-	1.3	5.0	9.0	43.3
Canada:									
1979	7.6	-	-	-	-	-	-	-	7.6
1980	6.3	-	-	-	-	-	-	-	6.3
Other FME:									
1979	4.0	1.7	-	1.0	?	-	2.0	0.6	9.3+
1980	7.0	0.3	-	1.1	?	-	2.0	?	10.4+
Total[a]:									
1979[b]	43.8	38.3	3.4	14.2	0.8+	4.1	8.7	11.3	124.6
1980[b]	60.0	36.2	3.5	13.4	1.1+	3.4	7.4+	9.0	134.0

[a]Excludes Eastern Europe.

[b]Coal trade information from a given importing country is rarely consistent with the information from the corresponding exporting countries. The information may differ with respect to both the quality (steam versus metallurgical) and the quantity of the coals traded. Quality differences may arise when metallurgical grade coals are used as steam coals by the importing country. Quantity differences may arise from reporting inaccuracies or the lag between departures and arrivals. During 1980, export/import information was particularly inconsistent. The figures shown in this table represent ICF estimates. These estimates place emphasis on the data of the exporting country for the total level of coal traded to a given country (steam and metallurgical) and emphasis on the data of the importing country for the proportion of shipments which were consumed as steam coals.

Source: *Appalachian Study*—table C-17.

APPENDIX D

Metallurgical coal production and exports, 1979-81

Country	Year	Production	Exports	Domestic demand	Met coal reserves(1)
			Millions metric tons		
U.S.A.	1981	682.1(1)	59.2	53.3	147,572
Do	1980	700.5(1)	57.2	59.7	----
Do	1979	600.2(1)	46.0	70.4	----
Australia	1981	50.6	39.9	9.4	18,981
Do	1980	48.7	33.3	8.6	----
Do	1979	48.5	34.1	9.0	----
Canada	1981	21.2(1)	13.7	6.3	27,300
Do	1980	19.7(1)	14.2	7.3	----
Do	1979	18.3(1)	13.0	7.9	----
China	1981	200.0	2.0(e)	NA	200,000
Do	1980	207.0	1.5(e)	----	----
Do	1979	212.0	1.0(e)	----	----
Germany	1981	65.9	11.2	36.2	17,250
Do	1980	64.9	12.3	36.8	----
Do	1979	64.3	15.2	34.1	----
India	1981	100.0(e)(1)	0.4(e)(1)	----	56,779
Do	1980	95.9(1)	0.4(e)(1)	NA	----
Do	1979	103.5(1)	0.4(e)(1)	----	----
Poland	1981	163.4(e)(1)	3.1(e)	23.4	11,500
Do	1980	193.1(1)	6.3	25.3	----
Do	1979	201.0(1)	8.4	25.5	----
South Africa	1981	9.3	2.9(e)(2)	7.3	1,000
Do	1980	7.9	3.1(e)(2)	7.4	----
Do	1979	7.9	2.3(e)(2)	7.2	----
USSR	1981	185.0(e)	23.0(e)	NA	87,000
Do	1980	185.0(e)	23.0(e)	----	----
Do	1979	185.0(e)	23.0(e)	----	----
United Kingdom	1981	127.5(1)	0.1(e)	10.8	38,000
Do	1980	130.1(1)	0.1	11.6	----
Do	1979	122.4(1)	0.1	15.1	----
Totals	1981	1,605.0	155.5	----	----
Do	1980	1,760.0	151.4	NA	605,382
Do	1979	1,658.9	143.5	----	----

(1) Represents anthracite and bituminous coal that can be used in the manufacture of coke, but is not limited to that end use.

(2) Classified as steam coal in South Africa, but used for blending by consumer in the production of coke.

Sources: Zinder-Neris, *World Coal Service; Coal Statistics International; World Coal;* U.S. Bureau of Mines Trade Data Reports.

APPENDIX E

Comparative delivered costs of steam coal exported to Japan and Europe from major producing countries

Destination/origin	Mine-mouth	Inland transportation	Ocean transportation	Total deliveries
		1980 dollar/million Btu		
To Japan, from:				
U.S. (west coast origins)	$1.10	$0.70	$0.45	$2.25
Australia	1.00	0.15	0.45	1.60
South Africa	1.00	0.30	0.65	1.95
Canada	1.35	0.50	0.40	2.25
To Europe, from:				
U.S. (east coast origins)	1.65	0.35	0.35	2.35
Australia	1.00	0.15	0.20	2.20
South Africa	1.00	0.30	0.65	1.95

Source: Interagency Coal Export Task Force at pp. 95 and 99.

APPENDIX F

Estimated coal exports and imports[1] steam and met, 1985-90 and 2000

Estimated planned exports	1985	1900	2000
	Million metric tons		
Australia	70	110	190
Canada	34	42	70
Poland	35	40	50
South Africa	36	43	60
United States	115	155	270
Other (including China and Columbia)	20	30	54
Totals	310	295	685
Estimated imports			
Western Europe	165	215	345
Pacific Rim	120	165	265
Other	10	15	25
Totals	295	395	635

[1]Excludes trade among Communist Bloc countries. Includes Communist country exports to Free World countries.

Source: Ecklund, supplemental at p. 18.

APPENDIX G

Hypothetical effect of Eastern Railroads' market power over domestic shippers on year 2000 steam coal exports to Europe assuming a constant port price for coal

F.o.b. pier price	Mine-mouth price	Rail rate (1) - (2)	Average rail net revenue (3) - 4.20	Volume (2) - 34.96 / 0.03198	Total rail net revenue (5) x (4)
(1)	(2)	(3)	(4)	(5)	(6)
	1980 dollars per ton			*Millions of tons*	*Millions of dollars*
48.00	39.60	8.40	4.20	145.1	609
48.00	[1]39.30	[1]8.70	4.50	135.7	611
48.00	[1]39.00	[1]9.00	4.80	126.3	606
48.00	38.00	10.00	5.80	95.1	552
48.00	37.00	11.00	6.80	63.8	434
48.00	36.00	12.00	7.80	32.5	254

Note: This table by National Economic Research Associates (p. 24 of December 21, 1981 Verified Statement) redone assuming a multiple of 2.5 instead of 5 to compute marginal extraction cost.

[1]Two mine-mouth price/rate levels have been added in order to pinpoint the profit-maximizing rate.

APPENDIX D

Service Date
Aug. 31, 1983

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 346 (Sub-No. 7)
RAILROAD EXEMPTION—EXPORT COAL

Decided: August 24, 1983

DECISION

The Coal Exporters Association of the United States, Inc. (CEA) and the National Coal Association (NCA), jointly[1] and the Eastern Coal Transportation Conference[2] (ECTC) have filed petitions requesting the Commission to stay pending judicial review the effective date of its decision to exempt the transportation of export coal from all provisions of subtitle IV of Title 49, United States Code. The Norfolk and Western Railway Company, Chessie System Railroads, and Seaboard System Railroad filed a joint reply.

The Commission's decision (*Export Coal*) was served June 9, 1983, to become effective September 12, 1983. On June 9, 1983 CEA/NCA and ECTC petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Commission's decision (Nos. 83-1629 and 83-1633).

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[1] Coastal States Energy Company filed a petition in support.

[2] ECTC's petition to exceed the page limitation is granted.

A stay of an agency action pending judicial review is an extraordinary action that should not be taken except in the most unusual situations. A stay is not a routine action taken simply because an agency action alters the *status quo.*

Rather, a party seeking a stay pending judicial review must establish: (1) that it will suffer irreparable harm absent a stay; (2) that other interested parties will not be substantially harmed by a stay; (3) that it has a substantial likelihood of prevailing on the merits; and (4) that the public interest favors a stay. *Washington Metropolitan Area Transit Comm.* v. *Holiday Tours*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). CEA/NCA and ECTC have met none of these criteria, as discussed below. Accordingly, we will not stay the decision.

1. *Irreparable Harm Not Shown*

We consider irreparable injury to be an indispensable part of the showing necessary to justify a stay. Here, petitioners have completely failed to make the necessary demonstration.

The irreparable harm claimed by CEA/NCA and ECTC takes several forms. First, they predict immediate and substantial rate increases that will assertedly price many coal producers out of the world market. We do not believe that rail carriers would behave in such a patently irrational manner, especially in the current soft coal market. See *Export Coal*, 20. Indeed, past experience indicates that rail carriers do not even take *authorized* general increases on export coal traffic. *Export Coal*, 9.

ECTC inaccurately asserts that rail rates on export coal have been "increasing" during the last several months, when they in fact are being reduced by some major carriers, a fact clearly reflective of the effect of the world coal market on rail rates. Similarly, the claim that contracts negotiated while the exemption is under judicial review will bind shippers to long-term high rates

is at odds with the railroads' own self-interest and with the sagging demand for coal in the world market in the near future. In short, the current and likely future condition of the world coal market will reduce even further the already minimal potential for any abuse of market power against shippers.

CEA/NCA asserts that our Environmental Assessment (EA) shows a "likelihood" that the exemption will result in increased rates and correlatively decreased export production. This is totally incorrect. The EA is *not* in any sense of prediction of rail pricing behavior. As we clearly stated (*Export Coal*, 23) the EA "predicted what would be the effect on production and transportation of U.S. Coal for export *given certain assumptions about rail price increases* for 1985, 1990, and 1995" using recognized econometric models (emphasis added). In other words, the EA merely estimated the effect of *assumed* rate level changes (both upward and downward) (See *Export Coal*, 23-24). In no sense did the EA establish the likelihood or magnitude of any increases (or decreases) in export coal rates. (We addressed that issue separately in the principal decision). Hence the EA provides no basis at all for a finding of irreparable harm to shippers in the absence of a stay.

Finally, the petitioners again entirely ignore our ability to revoke the exemption should unanticipated abuses occur that are attributable to the exemption. This revocation power gives us the power to remedy any injury, and thus refutes petitioners' claim of "irreparable" injury.

2. *Likelihood of Success on the Merits*

A. *Scope of Exemption Power*

ECTC argues that the exemption power conferred by Section 10505 does not apply to export coal, because coal has been "addressed" by Congress elsewhere in the statute. We find this argument unpersuasive for several reasons. See *Export Coal*, 13n. 32. First, Section 10505 contains three (and only three) express limitations to the

exemption power. These concern carrier liability for claims, intermodal ownership, and employee protection (Section 10505(e) and (g)). Hence, under settled principles of statutory construction, the absence of any other express prohibitions confirms the Commission's usual discretion[3] to decide which areas within its jurisdiction are appropriate for exemption.

If the mere mention of particular commodities or services elsewhere in the statute excluded those matters *a priori* from possible exemption, as urged by ECTC, the TOFC/COFC exemption affirmed in the *ATA* decision would not have been possible. See, *e.g.*, 49 U.S.C. 10922 (k), 10923(e), 10705a(k)(1). Obviously, that is not the case. Rather, Section 10505 "charge[s] [the Commission] with the responsibility of *actively pursuing* exemptions for transportation and service . . ." H. Rep. No. 1035, 96th Cong. 2d Sess. 60 (1980) (emphasis added). Indeed, Congress apparently "expect[s] that *as many as possible* of the Commission's restrictions on changes in prices and services of rail carriers will be removed . . ." H. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980) (emphasis added). See also *Export Coal* at 13-14.

Similarly, CEA/NCA argues that the exemption exceeds the Commission's authority under Section 10505 because it upsets a "balance" of regulatory restraint and pricing flexibility struck in the Staggers Act itself. Congress did not intend that all boundaries between regulated and non-regulated rail activity in the statute be preserved permanently. If that were true, the exemption power would not have been granted to this agency. Rather, the Staggers Act identified particular areas where reduced regulation was appropriate, *e.g.*, the jurisdictional revenue-to-cost threshold for rail rates, 49 U.S.C. 10701a, 10707a. But these statutory efforts to reduce

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[3] See *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1125-26 (5th Cir. 1981).

regulatory burdens are merely the starting point for further exemption under Section 10505. As explained in the Conference Report on the Staggers Act (H. Conf. Rep. No. 1430, *supra*, at 105):

> The policy underlying this provision [Section 10505] is that, while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.

Our efforts in this case to go beyond the statutorily deregulated areas are thus entirely consistent with the legislative design.

B. *Consistency With National Transportation Policy*

ECTC and CEA/NCA complain that our earlier decision to grant the exemption "omits" any discussion or analysis of various elements of the national rail transportation policy, 49 U.S.C. 10101a. We in fact devoted a considerable portion of our earlier discussion to Section 10101a issues. See *Export Coal* 14-20. The petitions for stay for the most part merely restate the arguments we considered and rejected in the principal decision. We therefore will not repeat our entire analysis here.

ECTC urges that the exemption violates Section 10101a (14) by frustrating the goal of "availability of accurate cost information." As the rail carriers point out in reply, most of the recordkeeping done by rail carriers is not differentiated on the basis of export or non-export transactions. Moreover, Section 10101a(14) addresses cost data "in regulatory proceedings." Exemptions necessarily eliminate regulation and the correlative proceed-

ings. Section 10101a(14) therefore cannot be a categorical bar to exemption where otherwise appropriate.[4]

ECTC also expresses concern with possible "non-compensatory" traffic and the Commission's supposed inability to monitor the honesty and efficiency of railroad management, both of which concerns are expressed in Section 10101a(10). Our earlier decision explained at length that the economic realities of the world coal market constrain rail rate increases and hence provide an inherent sanction against inefficiency. *Export Coal*, 20-23. We also noted (id. at 15) that below-cost pricing by rail carriers was not likely to occur for economically similar reasons. Hence the claim of potential non-compensatory traffic being handled on a large scale must be rejected for the same reason.

C. *Abuse of Marker Power*

CEA/NCA argues that the world market constraint on coal (and derivatively rail) pricing is "irrelevant" to the need for protection of shippers. This amounts to mere restated disagreement with the result we reached in our earlier decision. ECTC also urges that the world market price "cap" will not protect shippers or ensure a "reasonable" division of profits between coal producers and rail carriers.

As explained in our earlier decision, the long-run common interest of shippers *and* carriers is to bring into the world markets as much American coal as the market will absorb (*Export Coal* 20-22). It is precisely because of this commonality of interests that we believe the market to be an adequate constraint on export rates without further regulatory intervention. We recognize, although the

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[4] As the Fifth Circuit observed in *ATA*, *supra*, "the fact that the exemption has a limiting effect on the scope of . . . other provisions of the Interstate Commerce Act does not demonstrate that Congress did not mean what it said in Sections 10505(a) and (f)." 656 F.2d at 1122.

petitioning parties apparently do not, that coal exports are not a "zero-sum game" between the carriers and the shippers. Rather, the efficient and profitable operation of both businesses are mutually intertwined. Our exemption decision is not intended to favor one group at the expense of another, but to free the entire export coal industry from an unnecessary regulatory burden. We fully expect our action ultimately to benefit coal producers and carriers alike.

ECTC's remaining arguments on the need for shipper protection assume an entirely hypothetical "match" of individual mines against rail carriers in rate negotiations. As explained in our earlier order (*Export Coal*, 20-22), the presence of sizable transshippers possessing substantial bargaining leverage assures substantial parity between the parties in negotiating rate contracts.

ECTC argues that the antitrust laws are an inadequate remedy for any future market power abuse, because they apply only retrospectively and do not restrain pricing practices of "natural monopolists." We have explained previously that monopoly pricing and abuse of market power are not likely to occur in the economic environment of the export coal market because of economic market forces. See *Export Coal*, 20-23. But even if our estimate should prove wrong in some respect, the antitrust laws are not the only remedy. We have already stated (*Export Coal* 23), and we reaffirm here, that this agency stands ready to limit or revoke the export-coal exemption if, contrary to our expectations, proven abuses do materialize. See 49 U.S.C. 10505(d).

On a more fundamental level, however, reliance upon antitrust remedies in an exempted area of our jurisdiction is a basic part of the Congressional design embodied in Section 10505. As the legislative history confirms (H. Conf. Rep. No. 1430, *supra*, at 105) (emphasis added):

> The conferees anticipate that through the exemption process the Commission will eventually reduce its

> exercise of authority to instances where regulation is necessary to protect against abuses of market power *where other federal remedies are inadequate for this purpose.*

We consider it evident that the antitrust laws are among the most prominent "other federal remedies." Congress also has referred to the residual protection afforded by antitrust laws in other instances where rail matters were removed from regulatory supervision by statute. See, *e.g.*, H. Conf. Rep. No. 1430, *supra*, at 101 ("existing Federal antitrust laws apply" to contracts generally removed from Commission rate regulation under 49 U.S.C. 10713).

As to the supposedly ineffectual role of the antitrust laws in cases of "natural" monopoly, we do not believe ECTC has any real cause for concern. First, as an economic matter, we have rested our exemption decision on the ability of the world market, in combination with the economic self-interest of rail carriers and export coal shippers, to preclude true monopoly pricing. But even if a monopoly did arise (and ignoring the revocation option discussed earlier), the antitrust laws may well come into play.

ECTC argues that the antitrust laws are not an effective constraint because they do not apply to the pricing practices of a "single, natural monopolist" such as a coal-hauling railroad assertedly is. We do not accept the premise that any railroad has achieved monopoly power or is capable or likely to engage in monopolistic pricing on coal export movements. Indeed, our entire economic analysis of the export-coal market points in the opposite direction.

Second, ECTC is incorrect in asserting that the antitrust laws do not apply to unilateral actions of "natural" monopolists. Section 2 of the Sherman Act (15 U.S.C. 2) addresses both monopolization and attempts to monopolize. See *United States* v. *Grinnel Corp.*, 384 U.S. 563, 570-71 (1966); *United States* v. *Aluminum Co. of*

America, 148 F.2d 416, 431-43 (2d Cir. 1945). Certainly some anticompetitive conduct is a prerequisite to proof of monopolization. See *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1 (1911), *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273-75 (2d Cir. 1979), *cert. denied*, 449 U.S. 912 (1980). But an attempt to monopolize can be shown if there is a specific intent to monopolize and sufficient market power to create a dangerous probability of successful monopolization. *Alcoa*, *supra; Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1902). In either type of case, however, individual conduct (not merely collective activity) is within the reach of the Sherman Act. Hence we see no basis for rejecting *a priori* the availability of antitrust remedies in curbing potential abusive conduct.

D. *Exemption from Non-Rate Provisions of the Statute*

ECTC and CEA/NCA allege that the Commission improperly extended the coverage of the export coal exemption to all provisions of Subtitle IV of Title 49, United States Code, in contrast to the railroads' amended petition seeking exemption only from Sections 10701 through 10712. Assertedly, these non-rate aspects of the exemption were ordered without evidentiary support, and without explanation. This is incorrect.

Our notice of proposed rulemaking sought comment on the possible exemption of export coal transportation from *some or all* of Commission regulation. 46 Fed. Reg. 44529 (Sept. 4, 1981). See also *Export Coal* 1. In proposing an exemption (or any rule, for that matter) we are not limited by the scope of a party's request for a rulemaking. See 49 U.S.C. 10321, 10326.[5] Here we went

[5] The Staggers Act eliminated the requirement that we conduct a "proceeding" before ordering an exemption. *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 736-37 (1981). Here, however, we have given all interested parties a full and fair opportunity for prior comment.

beyond the (amended) request of the petitioning rail carriers. However, all parties had full notice that complete exemption was an option being considered. Compare 5 U.S.C. 553.

Although the principal focus of the comments was ratemaking, CEA/NCA and ECTC are incorrect in asserting that there was no record support for extending the exemption to include all provisions of the statute.[6] Moreover, the same economic restraints that will curb railroad pricing will also tend to curb service abuses.

We explained (*Export Coal*, 14-20) how complete exemption of export coal transportation would promote various goals stated in the national rail transportation policy, 49 U.S.C. 10101a. Obviously, many of those goals encompass areas far beyond rate matters. Thus, we did not limit our analysis to the rate sections of the statute as claimed by the petitioning parties.

We also explained how the exemption would improve the quality of rail service in two complementary ways. The tailoring of service to specific shippers' needs via contracts (rather than generally applicable tariff rates) should benefit the shippers. In addition, the use of long-term contracts should allow rail carriers better access to capital markets using the "collateral" of their contracts, thus fostering increased capital expenditures on loading facilities and equipment and a consequent improvement in the quality of service offered. As noted in our earlier decision, all parties benefit from an environment in which "certainty of future business [is] sufficient to justify new investment." *Export Coal*, 16.

As to the specific statutory provisions cited by CEA/NCA and ECTC, we find that these offer no basis for limiting the exemption before it has even been tried.

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[6] For example, improvements in *quality* of rail service as a result of the exemption were discussed. Petition for Exemption, V.S. R.J. Barber, pp. 19-21; Railroad Reply Comments Vol. I, V.S. Claytor; V.S. Collinson, p. 7; DOT Comment, p. 3; N&W Response, p. 21, V.S. Gobrecht, p. 14; DOT Opening Statement, pp. 8, 13-14, App. pp. 16-17.

Exempting export coal from the "commodities clause" (49 U.S.C. 10746) assertedly will allow rail carriers to somehow prefer their own coal over that of non-affiliated producers. The rail carriers, however, point out in reply (with supporting affidavits) that the coal supposedly controlled by the carriers exists in the form of mineral rights on railroad-owned land, usually leased for extraction to third parties on a long-term basis. Hence the rail carriers do not now have the type of vertically integrated corporate structure needed to make any such hypothetical preference feasible. Certainly at minimum the existence of long-term leases would preclude any substantial preference during the period needed for judicial review, even if these leasing arrangements ultimately are subject to alteration.

As to the coal-car distribution provision, 49 U.S.C. 11126, we see no substantial risk of abuse. The equipment for domestic and export coal movements is largely interchangeable, and our supervisory power over domestic coal car distribution is not affected by this exemption. Again, we believe that the carriers' self-interest and the reasons why carriers will not be able to engage in rate abuses will assure reasonable levels of service, and the quality of service should benefit from the increased ability of railroads to attract additional capital via increased reliance upon negotiated rates.

The "war emergencies" provision (49 U.S.C. 11128) is also of minimal concern. It becomes applicable only "during time of war or threatened war" and also requires a presidential certification or request to expedite or prefer military traffic. CEA/NCA and ECTC offer no reason why our response to any such emergency request from the President could not include an order temporarily revoking the exemption to the extent necessary.

The statutory codification of railroads' common carrier obligation (49 U.S.C. 11101(a)) is included within the coverage of the exemption. CEA/NCA and ECTC express concern that, once exempt from the section, the railroads will simply refuse to serve shippers. This

would, however, be contrary to the carriers' strong economic incentive to move as much coal traffic as possible. We also reiterate our readiness to revoke or limit the exemption if actual experience (not mere speculation) indicates that abuses are likely.

Similarly, the petitioning parties argue that exempting export coal movements from the contract-rate tariff and complaint structure of 49 U.S.C. 10713 will harm shippers by permitting railroads to lock them into undesirable contracts that cannot be "undone" if the exemption is reversed on judicial review. This claim is unpersuasive for several reasons. First, as we noted in our earlier decision, there appears to be substantial equality of bargaining power between shippers and carriers in the export coal market. See *Export Coal*, 21-22. Second, the market for export coal is presently soft, in part because coal prices and demand are reflecting the world price of oil. See *Export Coal*, 21.[7] Events since our decision confirm that rail rates on export coal are being kept at existing levels or even reduced. This confirms the crucial role of the world market price "cap." It also shows that for the period needed to complete judicial review of the exemption decision, the carriers are likely to be severely constrained even as to negotiated rate levels by the state of the world market. Hence the one-sided contracts hypothesized by ECTC and CEA/NCA are most unlikely. Finally, the railroads apparently concede in their reply to the stay petitions that our Section 10505(d) revocation power could reach contracts negotiated during a later-revoked exemption.[8]

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[7] The recent General Accounting Office study, *Prospects for Long-Term U.S. Steam Coal Exports to European and Pacific Rim Markets* (Aug. 4, 1983), confirms that "continued low oil prices will undoubtedly slow oil-to-coal conversion and depress coal demand growth." *GAO Study*, 11.

[8] We also see no reason to doubt that *force majeure* clauses addressing the future status of any exemption are an option available to all draftsmen of export-coal rate contracts.

We believe that the contentions of CEA/NCA and ECTC regarding the non-rate portions of the statute affected by the exemption reflect a fundamental misunderstanding of the exemption process. In any rulemaking, of course, we are engaged in a quasi-legislative activity. An exemption, moreover, is if anything closer to "delegated legislation" than most other rulemakings of this agency. Usually, our rules are discretionary efforts to "carry out" specific provisions of the statute under Section 10321(a). We issue such rules to fill various interstices in the statute. But in considering exemptions, we are performing a *mandatory* duty to eliminate regulation of rail transportation wherever the statutory criteria are met. Any exemption inherently involves an element of experimentation. As the court put it in *ATA*, *supra*, 656 F.2d at 1127:

> That Congress recognized that the effects of a particular exemption decision could not be predicted with certainty—and thus that the Commission would be exercising its exemption authority in the face of uncertainty as to the effect of on exemption—is apparent both from the controlling statute and legislative history.

Hence, all that this agency can do is to assure that "all relevant factors were considered and . . . articulat[e] a rational connection betwen the facts as it finds them and the conclusion it premises on those facts." *Id.* We believe that we have done so here, and that the stay petitions raise no substantial issue as to the rationality of the exemption decision.

Before turning to the other stay criteria, we address briefly an additional attack on the lawfulness of the exemption made by ECTC in its recently filed petition for judicial stay[9] (but *not* in its pleadings before this

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[9] *Eastern Coal Transportation Conferences* v. *USA and ICC*, U.S.C.A., D.C. Cir., No. 83-1633 (Motion for Stay, Aug. 12, 1983, pp. 67-70).

agency).[10] ECTC alleges that the export coal exemption "violates" the Merchant Marine Act of 1920, 46 U.S.C. 876(c)(2). That statute requires that a "rule or regulation . . . which affects shipping in the foreign trade" be submitted to and approved by the Federal Maritime Commission (FMC). ECTC claims that our exemption decision fails to comply with this requirement.

We do not believe that the export coal exemption "affects shipping in the foreign trade" within the meaning of the Merchant Marine Act. Accordingly, it does not require FMC review. Se *Improvement of TOFC/COFC Regulation, supra*, 364 I.C.C. at 733. As in the *TOFC/COFC* case, our exemption does not impair FMC's authority over port-to-port ocean carrier rates. ECTC offers no authority for including a rail exemption which ends at the water's edge within the Merchant Marine Act.[11]

Even if the exemption arguably falls within the scope of the Act, we believe that FMC's complete silence must be taken as implicit recognition that the statute does not apply or, if applicable, that FMC has no objection to the exemption. Almost two years have elapsed since the notice of the proposed exemption was published in the *Federal Register*. Yet FMC filed no comment, much less any objection. Compare *ATA, supra*, 656 F.2d at 1124. Moreover, we announced our tentative intention to grant the exemption in March, 1983, and after issuing a final decision in June, allowed an additional three months

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[10] Compare *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33 (1952). Accord, *Brotherhood of Ry. Employees* v. *St. Louis Southwestern Ry.*, 676 F.2d 132, 136 (5th Cir. 1982); *Brotherhood of R.R. Trainmen* v. *Chicago, M. St. P. & P.R.R.*, 380 F.2d 605, 608-09 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 928 (1967); *Litton Industries, Inc.* v. *FTC*, 676 F.2d 364, 369 (9th Cir. 1982); *NLRB* v. *GAIU Local 13-B*, 682 F.2d 304, 312 (2d Cir. 1982).

[11] The court in *ATA, supra*, expressly refused to decide whether the TOFC/COFC exemption as applied to ex-water traffic fell within the scope of the Act. 656 F.2d at 1124.

before its effective date. Yet FMC has not questioned the effect or propriety of the exemption in any communication to this agency. Compare *TOFC/COFC*, *supra*, 364 I.C.C. at 737; *ATA*, *supra*, 656 F.2d at 1124-25. In addition, although petitions for judicial review have been on file in the court since the day we issued our decision, FMC has not appeared in those proceedings or offered any objection to the scheduled effectiveness of the export coal exemption. Hence we do not believe that ECTC's claim based on the Merchant Marine Act raises any substantial doubt as to the lawfulness of the exemption.

3. *Harm to Other Parties Likely*

We devoted considerable attention to the beneficial effects of the exemption upon the rate contracting environment and correlative improved access of rail carriers to capital markets. *Export Coal*, 16. Many other benefits, including improvements in service and intermodal coordination are also likely. *Export Coal*, 16-17.

Against our best judgment that carriers (and the public) will benefit from prompt implementation of the exemption, CEA/NCA offers only the claim that, since the carriers do not now have the benefit of the exemption, they would not be harmed by a stay. If that illogic were correct, then *every* exemption (or any other change in the *status quo*) would have to be delayed until judicial review had been completed.

ECTC argues that, because the exemption is not motivated by an "emergency," other parties will not be harmed by a stay. This, of course, does not follow. Moreover, it is not the standard for a stay pending review. We do believe that ECTC's assertion regarding the non-urgency of the exemption bears further comment. Specifically, we emphatically reject ECTC's portrayal of the September 12, 1983 effective date as an indication that we allow a "full six months" to elapse after our decision, because the exemption was of no particular importance or urgency. In its petition, ECTC inaccu-

rately states that the exemption "decision" took place in early March. In fact, no legally binding decision was made until the final vote on May 26. The United States Court of Appeals for the District of Columbia Circuit has twice confirmed this by dismissing petitions for judicial review (including ECTC's) filed before the *actual* decision was served. Thus, the correct period between service of our exemption decision and its effective date is in fact barely three months, or about half that asserted by ECTC. Even that delay does not reflect any misgivings over the exemption or a belief that its prompt implementation is not necessary. Rather, we merely allowed a pre-effectiveness period comparable to that for other major rulemakings.

4. *Stay Contrary to the Public Interest*

ECTC and CEA/NCA contend that the public interest favors a stay because some federal agencies and members of Congress commented in opposition to the exemption. Despite the fact that various arms of the federal government may hold views different from ours, their opposition to a particular course of action is not the final word on the public interest. Moreover, CEA/NCA and ECTC fail to mention that another federal agency, the Department of Transportation, supported the exemption.[12] See *Export Coal*, 11. While we have seriously considered and respect the views of other federal agencies and legislators, the task of deciding whether to order an exemption is ultimately the responsibility of *this* Commission. That task is not merely an option, but a duty, for Section 10505 commands that we "shall" exempt particular rail transportation matters where the statutory criteria are met, as they are here. See *American Trucking Ass'ns, Inc.* v. *ICC*, 656 F.2d 1115, 1119 (5th Cir. 1981).

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[12] Another agency, the General Accounting Office, in its recent study of the world steam coal market, discussed the proposed exemption, but took no position on the merits of the exemption. See *GAO Study*, pp. 29-33.

It is ordered:

The petitions for stay pending judicial review are denied. The exemption will take effect as scheduled on September 12, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison. Chairman Taylor dissented with a separate expression.

AGATHA L. MERGENOVICH,
Secretary

[SEAL]

CHAIRMAN TAYLOR, dissenting:

In my dissent to the May 26, 1983, decision which approved the exemption for export coal, I pointed out many of the fallacies and inaccuracies in the majority's rational. Their belated attempt here, in response to a stay request, to buttress and paper over the fatally flawed decision on the merits only emphasizes their irresponsible election to disregard the law and evidence of record in order to achieve their desired result by resort to some carefully contrived rhetoric.[1] However, no artful use of words and phrases can change the bottom line, which is that no persuasive evidence was presented to justify a grant of the exemption for export coal.

Petitioners have more than met their burden for a stay pending judicial review. They have demonstrated not only the multiple substantive legal and procedural deficiencies of the May 26th decision, but they have also shown the severe and far-reaching damage which will

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[1] This somewhat cavalier attitude is documented by the fact that on March 3, 1983, the majority voted to exempt *all* export coal, including that moving through Canada and Mexico. Subsequently, this expansion was retracted for lack of notice and evidence in support of extending the exemption beyond U.S. ports.

occur should this decision take effect. There is a substantial likelihood that petitioners will prevail on the merits in court. Without question, the fact that the decision is arbitrary, capricious, an abuse of discretion, and not in accordance with the law, has been demonstrated repeatedly by the numerous documents placed in evidence by protestants to this exemption, by the reports generated by our own staff, and by the stay requests and court briefs of petitioners. Therefore, to avoid repetition, my remarks here will be limited to a discussion of the salient points germane to the stay request.

IRREPARABLE HARM HAS BEEN SHOWN

Petitioners have made a strong showing that the exemption, if allowed to take effect, will seriously injure the interests of coal producers, both with respect to their business posture and their ability to obtain continued rail service.

A number of specific results are authorized by the exemption. For example, insofar as railroads are concerned, they (1) would be under no obligation to provide service to shippers along their lines, (2) could set export rail rates from mine to port, (3) would be able to prefer coal shipments originating from railroad-owned mines to railroad-owned port facilities, and (4) could require captive coal shippers to choose between entering long-term contracts or face either rapidly rising rates or discontinued service.

Although the majority airily dismisses these ramifications, there are many cases, as will be discussed more thoroughly *infra*, when it would be in a carrier's best interests to exploit the exemption to the fullest possible extent.

While the railroads have supplied no economic calculation of how the volume of export coal will be affected by their actions under deregulation, the majority of the comments and the Commission's own Environmental

Assessment (E.A.)[2] support the conclusion that the exemption and the concomitant rate increases will result in a decline in demand for export coal.[3]

Purchasers in countries such as Japan, Spain, Brazil, Italy, the Netherlands, and Ireland, who currenly rely on U.S. coal as a reliable source in an unstable world market, have all expressed the concern that price increases and a lack of stability in the delivered price will reduce the attractiveness of U.S. coal as a reliable source and as an alternative for foreign coal, OPEC oil, and Soviet gas.[4]

Significantly too, these foreign markets, once lost, cannot be easily regained. One does not move easily in and out of the export coal market. The Commission's ability to revoke the exemption provides only after-the-fact assurances. In order to justify a revocation, the harm would have to occur, notice would have to be given, comments would have to be received, and positive action would have to be taken by the Commission. By the time this chain of events takes place, irreparable damage will have been done, so revocation is, at best, an imagined remedy.

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[2] If, as the majority seems to suggest, the EA's assumptions regarding increased rates and decreased volumes are not relevant, one must then ask what value it has and why the majority has relied upon it to fulfill the NEPA requirements?

[3] See generally the recent report by the Energy Information Administration, U.S. Dept. of Energy, *Railroad Deregulation: Impact on Coal*, issued August 1983 (EIA Study). This study concludes that the most likely trend, given the exemption, is increased rates and decreased production.

[4] The United States Department of Commerce, in a statement supporting CEA/NCA's petition to reopen the record in this proceeding, noted that the United States' share of the export market is already beginning to decline, "due in part . . . to the perception on the part of foreign purchasers that rates for the rail transportation of U.S. export coal will not likely be subject to any form of regulatory constraint in the future."

PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

The Staggers Act is a comprehensive document which embodies Congressional concern for the well-being of both carriers and shippers. As such, its legislative history and various provisions must be considered as a whole. To evaluate each part in a vacuum, as the majority proposes, ignores the very essence of the Act, which is to remove regulatory restraints whenever adequate competition is present, but to continue regulation when the marketplace is unable to protect captive shippers. The legislative history of the Staggers Act is replete with expressions of Congressional concern for captive shippers in general and captive coal shippers in particular.[5]

Thus, the Staggers Act was intended to stimulate competition, not stifle it at the expense of captive shippers, and the exemption provision, 49 U.S.C. 10505, is an integral part of that Act. Before approving an exemption under Section 10505, the Commission must find that regulation is not necessary to carry out the national rail transportation policy and that the exemption proposed is either of limited scope or is not likely to result in an abuse of market power.

In reaching to approve the export coal exemption, the majority, of necessity, was obliged to ignore those aspects of the evidence which did not support their desired result. Many of the elements of the national transportation policy mitigated against the exemption and so they were ignored. The potential for abuse of market power was dismissed with the generalization that it is in the "interest of shippers and carriers . . . to bring into the world market as much American coal as the market will absorb." But consider that export coal has neither intra nor intermodal competition; that it moves almost entirely by rail, generally with access to only one originating railroad; and that there is little, if any, geographic or product competition. Moreover, any competition in the world

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[5] See, e.g., S.Rep.No. 470, 96th Cong., 1st Sess. 7-8, 17, 43, (1979); H.Rep. No. 1430, 96th Cong. 2d Sess. 80 (1980).

market serves only as a price cap which provides no control over the division of profits below that point.

Therefore, despite all the convolutions of logic engaged in by the majority, the question is: Will the railroads, freed from any regulatory constraint, act benevolently or in their own best interests? Without competition or the bargaining chips afforded shippers by the Staggers Act protections, there is little incentive for a carrier to negotiate with a shipper. Contrary to the meaningless assurances of the majority that it will be in the best interests of the railroads to negotiate, the truth is that carriers will logically have the financial incentive to present an export coal shipper with a rate and service offering that best suits the railroad.

In fact, in a softening world market with declining volumes, it can be expected that any price decreases to meet the world price will come at the expense of the producer and not the carrier. Further, due to economies of scale, higher profits made at the expense of the producer will more than compensate a railroad for any decreases in the amount of export tonnage.[6]

But, assuming arguendo, that a railroad *would* seek to carry all the coal traffic it can handle, whose coal will be transported to satisfy the soft world market? (And here is where the relationship between the rate and nonrate portions of the exemption comes into play.) Without the common carrier obligation of 49 U.S.C. 11101(a), or the car hire/car service requirements of 49 U.S.C. 11126, will service be provided to the large shipper that guarantees unit trains or to the small mine that ships only a few cars? Without the commodities clause in 49 U.S.C. 10746, or the statutory protections against discriminatory rates, will the better transportation rate go to mines located on railroad-owned lands[7] for the long haul to railroad-owned

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[6] See also E/A Study, *supra* n. 3, and Appendix A, in my dissent to the May 26th decision, at 47.

[7] In many cases, the "third-parties" holding the long-term leases are actually rail affiliates.

port facilities, or to other coal producers competing in the export market? What bargaining power does a coal producer have when offered either a long-term contract or no service at all? And lastly, what is the alleged "benefit" that the majority believes coal producers will derive from this exemption?

These questions are but a few of the many that could be posed to illustrate the majority's deficient analysis and their failure to adequately consider the statutory balancing of interests called for by the Staggers Act.

Lastly, the majority's election to by-pass the preparation of an Environmental Impact Statement constitutes an incurable omission, as pointed out in my dissent to the May 26th decision. The hastily assembled EA is not only an inadequate substitute for the statutorily required EIS, but it does not even provide sufficient EA information. For instance, the basis for the EA's results is its composite case that rates will most likely increase and exports decrease as a result of the exemption.[8] But the majority now states that this is *merely* a prediction and provides no basis for a finding that coal shippers will be harmed. However, if the EA's entire analysis is merely a prediction which the majority declines to accept, then the EA must also be inadequate to satisfy the requirements of the National Environmental Policy Act, 49 U.S.C. 4332(2)(C).

THE STAY WILL NOT HARM OTHER INTERESTED PARTIES

There is nothing in the record or the pleadings to indicate that the railroads would be injured by a stay. It is especially telling that only two railroads, the N&W and the Chessie, have objected to the stay, and their principal argument is that a stay would impede their ability to contract for export coal shipments. However, hundreds of coal contracts have been filed with the Commission and no railroad has been able to document even a single oc-

[8] A position supported by the EIA Study, *supra* n. 3

casion where a contract has been lost because of regulation. Accordingly, there is no reason to believe that a stay would deprive the railroads of their ability to contract for export coal shipments.

Furthermore, railroads already exercise a substantial measure of ratemaking flexibility. Both the market dominance jurisdictional threshold and the Commission's recent decision proposing maximum coal rate guidelines, Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines, Nationwide* (not printed), decided February 8, 1983, provide the railroads with broad pricing discretion. Therefore, the carriers will not be harmed by a stay which merely maintains the status quo pending judicial review.

THE STAY WILL FURTHER THE PUBLIC INTEREST

There is considerable evidence that the market for export coal is softening. The filings of the Departments of State and Commerce, the U.S. Trade Representative, and foreign buyers of U.S. coal, all show how sensitive the market is to the pricing of its component elements (production, transportation-to-port, shipping, etc.). It is important to our national security that our allies have a secure, economic, and competitively priced alternative to unpredictable supplies of imported energy. The exemption, by shifting profit from producer to carrier, will exacerbate the decline in coal exports, thereby undercutting a key element of U.S. international energy policy, and will substantially weaken, if not eliminate, a potentially important factor in restoring to this nation a favorable balance of trade.

Additionally, the E.A. and the testimony of the three Senators appearing at the oral argument on June 16, 1982, demonstrate the relationship between regional coal industry employment and the export market. A diminishing demand for export coal translates directly into reduced production in coal supply regions. The Commission's E.A. composite case shows that a complete loss of all export production in four states, and substantial pro-

ductivity reductions in others, will be a direct result of the declining demand for export coal brought about by increased transportation rates. These losses will have a severe adverse impact upon the nation's balance of trade, upon primary and secondary employment levels, upon local and regional tax bases, and upon the communities and families that depend on mines which are forced to decrease or stop production.[9]

The public interest, therefore, lies in staying the decision until a Court of Appeals has thoroughly reviewed the many serious legal issues which have been raised with regard to the export coal exemption.

SUMMARY

The majority's self-styled "experiment" will not promote the national transportation policy, nor is it of limited scope, and it will most certainly result in undue concentrations of market power. While the railroads will undoubtedly have increased opportunities for financial gain as a result of the exemption, this gain will only be achieved by a distinct lessening of competition, a distortion of the demand for services, unreasonable costs for captive coal shippers, and a serious misallocation of resources, together with negative effects on our economic and social well being, on our national security, and on our foreign policy. Consequently, our "mandatory duty" was to deny the export coal exemption. As a recent Court of Appeals decision noted, the transaction envisioned by Congress under the Staggers Act should be a "measured passage from the old regime to the new" and not "a hasty rout." [10] Petitioners' right to a stay has been unjustly denied.

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[9] As discussed *infra*, any possible revocation would only occur after the harms had occured.

[10] *Ford Motor Co. v. Interstate Commerce Commission and United States of America*, No. 82-1630, slip op. at 3 (D.C. Cir. Aug. 9, 1983).

APPENDIX E

STATUTES INVOLVED

Section 10505, Title 49, United States Code provides that:

> Authority to exempt rail carrier transportation
>
> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
>
> (b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.
>
> (c) The Commission may specify the period of time during which an exemption granted under this section is effective.
>
> (d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.
>
> (e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this

subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Section 10101a, Title 49, United States Code provides that:

Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

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Nos. 84-884 and 84-885

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

NORFOLK & WESTERN RAILWAY COMPANY ET AL., PETITIONERS

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in determining to exempt the rail transportation of export coal from regulation under the Interstate Commerce Act on the basis of an undisturbed finding that carriers and shippers have relatively equal bargaining power, the Commission was required to engage in a detailed analysis of the reasonableness of the resulting rates, including a determination of each affected carrier's actual revenue needs, the size of the revenue gains they would likely receive from the exemption, and the degree to which needed revenue gains would be disproportionately subsidized by one group of shippers.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-884

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

No. 84-885

NORFOLK & WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a)[1] is reported at 745 F.2d 76. The decision of the Interstate Commerce Commission (Pet. App. 50a) is

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[1] "Pet. App." refers to the appendix to the petition in No. 84-884.

reported at 367 I.C.C. 570. The opinion of the Commission on denial of petitions for stay pending judicial review (Pet. App. 126a-149a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48a-49a) was entered on September 18, 1984. The petitions for a writ of certiorari were filed on December 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

The National Rail Transportation Policy, 49 U.S.C. 10101a, and the exemption authority, 49 U.S.C. 10505, are reproduced at Pet. App. 150a-152a.

STATEMENT

This case concerns the Commission's decision to exempt the rail transportation of coal bound for export from regulation under the Interstate Commerce Act, 49 U.S.C., Subtitle IV, pursuant to its statutory exemption authority, 49 U.S.C. 10505. The history and nature of that authority are described at greater length in the brief for the United States in *Interstate Commerce Commission* v. *Brae Corp.*, petitions for cert. pending, Nos. 84-550 & 84-867.[2] Under Section 10505, the Commission is directed to grant an exemption from some or all provisions of the Act to any class or category of rail traffic where the Commission finds that further regulation is not necessary to carry out the National Rail Transportation Policy (49 U.S.C. 10101a) and is "not needed to protect

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[2] A copy of our brief in *Brae Corp.* has been provided to the parties in this case.

shippers from the abuse of market power." 49 U.S.C. 10505(a).[3]

1. *The Commission's Decision*

After providing notice and receiving numerous comments from interested parties, including five federal agencies, the Commission determined (Chairman Taylor dissenting) that the transportation of coal bound for export should be exempted from regulation under the Interstate Commerce Act.[4] The transportation of coal destined for domestic markets remains regulated. In accordance with the statute, 49 U.S.C. 10505(a), the Commission found first that continued regulation is not necessary to carry out the National Rail Transportation Policy and second that it is not needed to protect shippers from the abuse of market power.

a. *The National Rail Transportation Policy.* The Commission determined, applying the factors set forth in 49 U.S.C. 10101a, that the exemption "will be beneficial to the railroad industry, the export coal industry, and the Nation" (Pet. App. 82a). Not only would the exemption enable rail carriers, which currently are generating insufficient revenues to cover their costs and attract capital (*Railroad Reve-*

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[3] Alternatively, the Commission may exempt transportation or services "of limited scope" (49 U.S.C. 10505(a)(2)(A)); however, the Commission made no such finding in this case (Pet. App. 73a n.37). The exemption authority is also limited in several additional respects not relevant here. See 49 U.S.C. 10505(e) and (g).

[4] Notice and comment procedures are not required under the Act. Compare 49 U.S.C. 10505(a) and (d) with 49 U.S.C. (Supp. IV 1980) 10505(a) and (d). See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 104-105 (1980).

nue Adequacy—1983 Determination, Ex parte 457 (I.C.C. Dec. 17, 1984)), to earn more adequate revenues (Pet. App. 75a), but it would lead to significant operating efficiencies, to the benefit of carriers, shippers, and the public. Principal among these is the increased use of long-term contracts, which "foster efficiency because they provide the flexibility necessary to develop sensitive and innovative rate and service proposals, and the certainty of future business sufficient to justify new investment" (*id.* at 76a). The Commission explained that the current system of maximum rate regulation is a "strong impediment" to negotiated contracts (*id.* at 76a). Moreover, increased pricing flexibility will in itself lead to more "rational ratemaking" (*ibid.*), and the exemption will "free the railroads to arrange intermodal movements where this will prove efficient" (*ibid.*).

For these reasons, the Commission concluded that the coal exemption would promote some seven elements of the National Rail Transportation Policy: the policies of allowing competition and the demand for services to determine rates and services (49 U.S.C. 10101a(1)) (Pet. App. 73a), of minimizing the need for federal regulatory control (49 U.S.C. 10101a(2)) (Pet. App. 73a), of promoting the efficiency of the transportation system and enabling rail carriers to earn more adequate revenues (49 U.S.C. 10101a(3)) (Pet. App. 75a), of aiding the development and continuation of a sound rail transportation system with effective competition to meet the needs of the public and national defense (49 U.S.C. 10101a(4)) (Pet. App. 77a, 78a), of improving coordination among rail carriers and other modes (49 U.S.C. 10101a(5)) (Pet. App. 77a), of encouraging the honest and efficient management of rail-

roads (49 U.S.C. 10101a(10)) (Pet. App. 76a-77a), and of encouraging rail carriers to rely on individual rate increases rather than increases of general applicability (49 U.S.C. 10101a(11)) (Pet. App. 75a n.39).

The Commission also concluded that continued regulation is not needed to carry out any of the remaining elements of the policy (Pet. App. 73a). It focused particularly on the element most stressed by opponents of the exemption, the policy of preventing predatory pricing and practices (49 U.S.C. 10101a (13)) (Pet. App. 75a, 79a-80a).

b. *The abuse of market power.* The Commission also concluded that continued regulation of the transportation of export coal is not needed to protect shippers from the abuse of market power, a finding required under 49 U.S.C. 10505(a)(2)(B). Its conclusion was based on three principal considerations: (i) structure of the market; (ii) recent history of export coal rates; and (iii) existence of alternative safeguards.

(i) *Market structure.* The Commission found (Pet. App. 52a) that "[c]oal exported from the United States is a part of a competitive world coal market made up of large and sophisticated buyers and sellers. * * * [T]his competition effectively restrains the rates charged by rail carriers." [5]

The international coal market is "extremely sensitive" to price changes; United States coal sellers

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[5] It should be noted that the Commission did not determine that railroads have a complete absence of "market dominance" in this area. Carriers without "market dominance" are not subject to maximum rate regulation. 49 U.S.C. 10701a(b)(1). In the context of maximum rate regulation, therefore, the exemption authority comes into play only for carriers that have some degree of market power.

face a market in which, "within fairly close constraints," the price is fixed. Pet. App. 56a. See also *id.* at 74a. The United States share of the market has been steadily declining in recent years, and there is now a substantial international coal surplus. *Id.* at 56a-57a. Because railroads "have a large amount of capital invested in the coal industry on which there will be no return if coal is not produced and moved over their lines" and indeed "depend upon increasing volumes of export coal to amortize their heavy investment and finance new construction" (*id.* at 83a-84a), rail carriers can be expected to set rates at a level that will enable United States coal to compete effectively in world markets. In this, "the railroads' interests closely approximate those of the mines they serve" (*id.* at 84a). Accordingly, while rail rates may increase under an exemption, the Commission concluded—contrary to the arguments of opponents of the exemption—that rates "are unlikely to increase sufficiently to reduce the volume of export coal significantly or to force the mineowners into a situation where their return on investment would be inadequate" (*ibid.*).[6]

Given that the delivered price for export coal is effectively fixed, the Commission analyzed "the issue of the potential for market abuse" in the context of the divisions of economic "rents" between coal producers and railroads (Pet. App. 83a). The Commission used the term "rents" to signify the excess of the delivered price of export coal over the costs (including return on investment) of producing and

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[6] The principal argument of opponents of the exemption before the Commission was that railroads, if deregulated, would raise their rates to a point that would reduce overall production for export. Pet. App. 68a-70a.

transporting it. See *id.* at 67a, 74a. Even on the assumption that "most coal mines are served by but a single railroad" (*id.* at 84a), the Commission concluded that "coal exporters are an extremely concentrated industry with sufficient bargaining leverage to prevent unreasonable pricing by the railroads" (*ibid.*). On the basis of geographical competition,[7] intramodal competition,[8] and intermodal competition,[9] the Commission found that rail carriers and export coal shippers have "relatively equal bargaining power" (*id.* at 74a)[10] and that "market competition and natural forces of supply and demand, without interference from this regulatory agency, will establish reasonable and rational rates for this traffic" (*id.* at 74a-75a).

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[7] Foreign purchasers have the option of obtaining coal from several alternative regions of the United States. Thus, a railroad serving a particular area has the incentive to keep rates low and thereby improve the competitive position of its shippers. To the extent that transportation costs render an area uncompetitive, the railroads serving that area would lose traffic. Pet. App. 63a-64a.

[8] Since "for most coal export traffic" the railroad deals not with an individual mine owner, but with a large broker or "transshipper" who owns or controls the output of many mines in different areas, the railroad is unable to set prices unilaterally. The transshipper is able to shift production from mine to mine (and railroad to railroad) in response to railroad pricing decisions. Pet. App. 84a-85a.

[9] Competition from motor carriers and (particularly) barges, and potential competition from coal slurry pipelines, also restrain railroad pricing. Pet. App. 85a.

[10] See also Pet. App. 132a ("the presence of sizable transshippers possessing substantial bargaining leverage assures substantial parity between the parties in negotiating rate contracts"); *id.* at 137a ("there appears to be substantial equality of bargaining power between shippers and carriers in the export coal market").

The Commission acknowledged that there would be variation in bargaining power among particular cases. "In some cases the shipper will have more leverage; the converse will be true in others" (Pet. App. 86a n.67; see *id.* at 66a-67a). While finding that shippers and carriers have "relatively equal bargaining power" in most cases, the Commission noted that "even in the rare instance" where a particular carrier might have significant leverage over a small shipper it serves, it would be contrary to the carrier's interests to raise prices to the point that the volume of traffic suffers (*id.* at 85a-86a).

(ii) *Recent history of export coal rates.* The Commission found that the "history of rail export coal pricing behavior supports the premise * * * that the railroads' export coal prices are constrained by strong delivered price competition and that railroads are dealing with customers who have substantial bargaining power" (Pet. App. 64a). Prior to 1980, "not a single maximum rate complaint concerning export coal was filed with the Commission" (*ibid.*).[11] Coal export rates were increased, at most, in connection with general rate increases for all traffic; indeed, railroads " 'flagged out' of several general rate increases on export coal, presumably due to competitive factors" (*ibid.*). This history contrasts sharply with

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[11] As part of the Staggers Rail Act of 1980, Congress determined that any then-existing rail rates that had not been challenged as of 180 days from the date of its enactment would thereafter be conclusively presumed lawful. Section 229(b) of the Staggers Act, 49 U.S.C. 10701a note. This created an incentive for the immediate filing of complaints. Passage of the Act triggered the filing of over 800 maximum rail rate complaints, among which were complaints challenging most export coal rates. These complaints are now pending before the Commission. See Pet. App. 64a.

that of the transportation of coal bound for domestic markets, where there were "substantial increases" and "extensive litigation before the Commission" challenging the reasonableness of rates (Pet. App. 64a). Further, between 1969 and 1974, minehead prices increased 468% while export coal rail rates rose only 57%; adjusted for inflation, coal prices increased two and one half times between 1969 and 1982, while rail rates increased by less than half. *Id.* at 65a. While the index of materials costs for eastern export coal carriers rose 93% between 1975 and 1981, their export coal rates rose only 82% (*ibid.*). The Commission concluded (*ibid.*):

> These results indicate at a minimum that the unregulated shippers of export coal have considerable bargaining power in the contest over division of the economic rents from export coal. * * * This history indicates that the pricing restraint of rail carriers was not the result of the exercise of regulatory power by this Commission, but rather resulted from the play of market forces.

(iii) *Alternative safeguards.* Finally, the Commission noted the existence of two alternative safeguards that would "protect against any abuse of market power" (Pet. App. 87a). First, the antitrust laws would "provide[] assurance that levels of rates and services for exempt transportation do not become unreasonable" (*ibid.*). Second, "the railroads know that if they engage in any abuse of market power, [the Commission] may revoke" the exemption and restore regulation (*ibid.*). "This will be a strong incentive to the carriers not to abuse their market power even if a particular railroad were to develop sufficient leverage to be able to do so" (*ibid.*).

2. *The court of appeals' opinion*

The court of appeals vacated the exemption decision and remanded to the Commission "for any further proceedings that may be appropriate" (Pet. App. 47a).[12] The court first reviewed (Pet. App. 11a-26a) the Commission's factual findings regarding market structure and rail pricing history, including evidence presented by opponents of the exemption (and summarized by Chairman Taylor in dissent) that conflicts with the Commission's findings. While not affirming the Commission's findings, the court of appeals did not declare them arbitrary or capricious; it left them undisturbed. Those findings therefore constitute the factual predicate for this case.

The court next discussed at length (Pet. App. 27a-34a) the absence of any finding by the Commission that the coal export railroads have "no market power" or that there is "effective competition." See note 5, *supra*. The court acknowledged in a footnote (Pet. App. 28a n.18), however, that the Commission is authorized under 49 U.S.C. 10505 to grant an exemption from regulation even where the affected carriers possess market power and there is an absence of "effective competition." The standard, as the Commission has held (Pet. App. 82a) and the court agreed (*id.* at 28a n.18), is whether in the absence of regulation there would be an "abuse of market power" (49 U.S.C. 10505(a)(2)(B)). See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 105 (1980) ("The bill permits exemptions wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition.").

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[12] The export coal exemption has been in effect since September 12, 1983. The court of appeals' mandate is stayed pending this Court's action on the petitions for certiorari.

The court then turned to the Commission's analysis of the National Rail Transportation Policy, 49 U.S.C. 10101a. The court observed that the Commission had "discussed how the exemption would further a number of the policy provisions" (Pet. App. 34a), but did not state what those findings were or hold that they were arbitrary or capricious. The court observed (*ibid.*) that the Commission "hardly mentioned" 49 U.S.C. 10101a(6), which establishes a policy of "maintain[ing] reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system." However, the court concluded (Pet. App. 36a n.22) that "the failure to discuss the section explicitly is not in itself fatal" and that the "reasonable rate" policy of Section 10101a (6) is included within the concept of "abuse of market power" as it appears in the exemption provision, 49 U.S.C. 10505(a)(2)(B) (see Pet. App. 39a). The court thus reasoned that the Commission's "explanation" of how an exemption would be consistent with the "reasonable rate" policy is to be found in its "more general analysis of the 'abuse of market power' provision" (*id.* at 36a).

With respect to the "abuse of market power," the court held, as a "legal, not a factual question" (Pet. App. 27a) that the Commission's "understanding" of the statutory term "abuse of market power" is erroneous. See Pet. App. 47a. Although the Commission did not explicitly define "abuse of market power," the court discerned in its opinion the following "standard" (Pet. App. 37a):

> so long as coal shippers are not forced to reduce production (*i.e.*, so long as the rail rate leaves them a share of the revenue that covers their costs, including their costs of capital) and so

> long as they are not wholly excluded from any economic rents above that level, their rate is "reasonable" and there is no "abuse of market power."

The court rejected this purported "standard" and accordingly vacated the decision.

The court stated that "[t]he rate reasonableness provision of Section 10101a(6) and the 'abuse of market power' provision of Section 10505(a)(2)(B) should be read as reflecting the policies of the statutory scheme of which they are a part" (Pet. App. 44a), and inferred that "[p]rotecting the revenues of shippers who face carriers with market power was an essential goal, though not the only goal, of the compromise that produced the Staggers Act" (*ibid.*).

Specifically, the court faulted the Commission (Pet. App. 44a-45a) for relying on competitive factors without "explain[ing] why reliance on them is sufficient to protect those interests of shippers" and for referring to the policy of promoting railroad revenue adequacy without determining (*id.* at 45a)

> the actual revenue needs of the carriers involved or the size of the revenue gains they would likely receive from the exemption, or the degree to which needed revenue gains would be disproportionately subsidized by one group.

It was not sufficient, according to the court (*id.* at 46a), for the Commission to determine that "competitive factors" would guarantee that the "division of rents would * * * equal some undisclosed balance that would constitute a condition of reasonable rates and nonabuse of market power"; the Commission had to "explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and nonabuse of market power."

ARGUMENT

Congress has declared it to be the national policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and "to minimize the need for Federal regulatory control over the railroad transportation system." 49 U.S.C. 10101a (1) and (2). The exemption authority, 49 U.S.C. 10505, is "an important cornerstone" of that policy. H.R. Rep. 96-1035, 96th Cong., 2d Sess. 79 (1980). Congress intended the exemption authority to reflect a "totally new approach to the railroad industry" in which "competitive factors [would] be of paramount and exclusive importance" (126 Cong. Rec. 28431 (1980) (Rep. Staggers)). The Commission was charged with "actively pursuing exemptions" (H.R. Rep. 96-1035, *supra*, at 60), and directed to remove "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." H.R. Conf. Rep. 96-1430, *supra*, at 105. Congress viewed the exemption authority as "experimental" and "innovative" (H.R. Rep. 94-725, 94th Cong., 1st Sess. 243 (1975)); it freed the Commission to implement exemptions, and to revoke them, without even notice and comment procedures. H.R. Conf. Rep. 96-1430, *supra*, at 104-105. Through use of the revocation power, Congress urged the Commission to "adopt a policy of reviewing carrier actions after the fact to correct abuses of market power" (*id.* at 105).

The court of appeals has seriously misunderstood the nature of the Staggers Act exemption authority, and has announced legal standards that, if not reversed, would make it virtually impossible for the Commission to implement the provision in the man-

ner Congress intended. Where Congress provided for a sharp break from the regulatory principles of the past century, the court insisted on reading those principles back into the exemption provision; where Congress envisioned a flexible and experimental approach toward deregulation, the court imposed onerous additional substantive requirements. The difficulty created by the judgment below arises from the fact that it was expressly predicated on a "legal, not a factual, question" (Pet. App. 27a). The court's construction of the Staggers Act exemption authority therefore will apply to all future exemption cases. This is especially troubling since all such cases may be brought in the District of Columbia Circuit. 28 U.S.C. 2343. Because of the importance of the Staggers Act exemption authority to Congress's effort to revitalize the railroad industry by eliminating unnecessary and inefficient regulation, the decision warrants this Court's review.[13]

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[13] The United States has also recommended that the Court grant petitions for certiorari in *Brae Corp.* v. *ICC, supra,* a case involving the Commission's boxcar exemption. The two cases present similar issues under different legal rubrics. Both cases involve the division of economic rents after deregulation, and in both cases the District of Columbia Circuit imposed additional requirements on the Commission, derived from other sections of the Interstate Commerce Act. In *Brae,* the court concluded that the National Rail Transportation Policy impliedly incorporated protections for small short haul carriers contained in 49 U.S.C. 10705a. Here, the court concluded that both the Policy and the "abuse of market power" standard impliedly incorporate the rate reasonableness standards of 49 U.S.C. 10707a(e)(2)(B). See Br. for the United States in *Brae.*

As in *Brae,* if the petitions in this case are granted, the Commission and the United States undertake to file a joint brief on the merits.

The Commission addressed both of the statutory prerequisites to granting an exemption under 49 U.S.C. 10505, and concluded that further regulation of the rail transportation of export coal is not needed to carry out the National Rail Transportation Policy or to protect shippers from the abuse of market power. Pet. App. 73a. The Commission's determination that an exemption would promote some seven of the 15 elements of the transportation policy, without being inconsistent with any (see pages 3-5, *supra*), was virtually ignored by the court.[14] The basis for the court's decision was that the Commission's "understanding" of the statutory phrase "abuse of market power" is deficient (Pet. App. 47a). We submit that the court misconstrued the Commission's decision and that, more importantly, the interpretation of the "abuse of market power" standard adopted by the court is erroneous and unworkable.

1. In determining that continued regulation is not necessary to prevent abuses of market power, the Commission did not enunciate a comprehensive defini-

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[14] The court's only comment (Pet. App. 34a-35a) on the Commission's extensive discussion of the National Rail Transportation Policy was that the Commission gave insufficient attention to the policy of maintaining reasonable rates where there is an absence of effective competition and where rail rates provide revenues that exceed the amount necessary to maintain the rail system and to attract capital (49 U.S.C. 10101a(6))—a policy that would appear, by its terms, to apply with full force only when the rail carriers involved are receiving adequate revenues. It is undisputed that none of the rail carriers involved here is in that category. In any event, the judgment of the court did not rest on this ground (Pet. App. 36a n.22), in part because, as the court correctly noted (*id.* at 36a, 39a), the Commission's analysis of this policy element was subsumed within its "abuse of market power" discussion.

tion of "abuse of market power"; nor has it done so in other exemption cases. The Commission did indicate that, at one extreme, a railroad would abuse its market power if it forced a shipper out of the market or appropriated all of the economic rents from the movement of coal to the export market (Pet. App. 79a, 83a, 85a). However, the Commission never stated that this was the limit of the concept of "abuse of market power." Since it found, in this case, that export coal shippers and carriers have "relatively equal bargaining power" and that "market competition and natural forces of supply and demand, without interference from this regulatory agency, will establish reasonable and rational rates for this traffic" (Pet. App. 74a-75a; see pages 6-7, *supra*), there was no occasion for the Commission to decide the outer limits of the statutory standard.[15] We submit that these findings, not disturbed by the court of appeals, were fully adequate under the exemption provision. Cf. *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981).

However, the court apparently concluded that these findings were legally insufficient to support an exemption.[16] The Commission must, according to the

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[15] We therefore will not address whether the court of appeals was correct that the term "abuse of market power" necessarily implies a degree of shipper protection in excess of that needed as a matter of allocative efficiency, *i.e.*, to ensure that there is no inefficient reduction in output. Cf. *Chesapeake & O. Ry.* v. *United States*, 704 F.2d 373, 376 (7th Cir. 1983). The Commission has not taken a position on that difficult issue and it is not necessary for a decision in this case.

[16] The court in fact never referred to these findings. The full context of the court's opinion indicates, however, that rather than overlooking the findings the court deemed them insufficient as a matter of law.

court (Pet. App. 46a), "explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and nonabuse of market power."

The court is demanding precision where it is neither possible nor appropriate. To ask how much competition is enough is like asking how many trees it takes to make a forest. If, as the Commission found, competitive forces are strong enough to prevent unreasonable rates (Pet. App. 75a, 84a), then they are strong enough to satisfy the statutory standard. The Commission explained at length why competitive forces in the market could be expected to maintain export coal rail rates at a reasonable level. The analysis similar in precision and degree of quantification to other exemptions approved by the Commission, including exemptions upheld on judicial review. See *Brae Corp.* v. *ICC*, 740 F.2d 1023, 1039-1040 (D.C. Cir. 1984), petitions for cert. pending on other grounds, Nos. 84-550 & 84-867 (boxcar traffic exempted from maximum rate regulation on the basis of predictions by the Commission of a "generalized nature" regarding "con[s]traints on market abuse," as well as the recent history of rates, which showed that "market abuse was rare, if not non-existent" and that this was attributable to "market forces," not to the Commission's "maximum rate prescriptions"); *American Trucking Ass'ns* v. *ICC*, *supra* ("piggyback" traffic exempted on the basis of similar considerations).

Indeed, the court's insistence on knowing how much competition is enough would make it impossible for the Commission to rely, as it did here, on general market structure and historical patterns of reasonable rates to determine that further regulation is not

needed. As explained in the statement (at 8-9), export coal rail rates over the past 15 years have been remarkably restrained (increasing less than rates on general traffic), "not [as] the result of the exercise of regulatory power by this Commission, but rather [as a result of] the play of market forces" (Pet. App. 65a). The Commission quite reasonably concluded that if regulation was not needed to restrain rates in the past, it probably would not be needed in the future. Such a determination should not be overturned merely because the Commission did not quantify how much competition there is or how much there should be.

The court of appeals also took issue with the legal "standard" it perceived the Commission to apply to the question of abuse of market power. However, the "standard" the court discerned in the Commission's opinion—an "indifference" to the division of profits above the level sufficient for both shippers and carriers to cover their costs and attract capital (Pet. App. 37a-38a; see pages 11-12, *supra*)—nowhere appears in that opinion.

The court explained that the Commission's "understanding" of the statutory exemption "emerged" from the Commission's discussion of the various competitive elements in the market (Pet. App. 12a-13a). However, the court ultimately concluded that the legal standard underlying the Commission's decision is "only indirectly related" to the competitive factors from which it supposedly emerged (Pet. App. 27a, 45a-46a). But if this legal "standard" is not enunciated in the Commission's opinion and is, by the court's own admission, of doubtful relation to the Commission's analysis, we are left to wonder why the court persisted in attributing it to the Commission.

The court's misunderstanding evidently arises from the Commission's discussion of the principal arguments presented by opponents of the exemption. The opponents contended, in summary, that if exempted from regulation the export coal carriers would increase rates to the point that volume would be reduced (Pet. App. 69a-70a) and that they would "appropriate most of the available rents" (*id.* at 69a). Since these were the principal arguments, it is understandable that the Commission's opinion would contain frequent responses to them—*e.g.*, that "the railroads will not price their services so as to reduce American coal production" and that they would not "appropriate all of the economic rents" from the export coal business (quoted by the court at Pet. App. 37a).

But the Commission made clear (Pet. App. 85a) that it is only in the "rare instance" that the railroad would be able to exercise this degree of market power. In the ordinary case, the bargaining power of the parties will be "relatively equal," with the shipper having the advantage in some instances, the carrier in others. The court plainly erred in deriving the Commission's legal standard from its discussions of the exceptional case.

2. Far more important to the Commission's ability to comply with its exemption mandate in future cases is that the court substituted an "abuse of market power" standard of its own, which is utterly unworkable and at variance with congressional intent.[17]

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[17] If the court was not able to determine what legal standard the Commission employed, it should have remanded to the Commission for clarification. See *Yonkers* v. *United States*, 320 U.S. 685 (1944). It is not the task of a reviewing court to construe a complex regulatory provision, involving accom-

The exemption authority, 49 U.S.C. 10505, is stated in broad terms; the standards for its use are explicit and the exceptions narrow and specific. The standards admittedly are not self-defining; they require both interpretation by the Commission and the balancing of conflicting elements of the National Rail Transportation Policy. But the statute does not invite a court to engraft upon the exemption provision any limitations other than those apparent on its face. See 126 Cong. Rec. 28431 (1980) (emphasis added) (statement of Rep. Staggers) (Section 10505 "would permit the exemption of any provision in the act, except as specified *in the exemption section*"). The court of appeals, however, specifically rejected exclusive reliance on the factors set forth in the exemption provision or by reference in the National Rail Transportaton Policy, and held that those standards "should be read as reflecting" the policies of other sections of the Interstate Commerce Act (Pet. App. 44a).

The court turned, specifically, to various sections of the Interstate Commerce Act that are designed to "[p]rotect[] the revenues of shippers who face car-

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modation of conflicting policies, in the first instance. Cf. *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956); *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

The court of appeals professed itself unable to defer to the Commission's interpretation of the "abuse of market power" standard because the Commission "did little to explain, in terms of the statute's language, structure, or history, why the concerns for protecting shippers from carrier monopoly were met by that standard" (Pet. App. 40a n.23). However, the failure of the Commission to articulate a justification for its "standard" is entirely attributable to the fact that it did not adopt any such "standard." Surely no elaborate explanation was needed to show that when shippers and carriers have "relatively equal bargaining power," there is no likelihood of an "abuse of market power."

riers with market power" (Pet. App. 44a), taking into consideration the revenue needs of railroads (*id.* at 41a-44a).[18] It gave special attention to the Long-Cannon Amendment to the Staggers Act, 49 U.S.C. 10707a(e)(2)(B), which establishes standards for judging the reasonableness of rates in light of the various potential revenue sources of the carrier. See Pet. App. 42a-44a. The "underlying logic" of these "Long-Cannon factors," as the court pointed out (Pet. App. 43a), is "that monopolistic discrimination should not be used to generate funds that could more efficiently and equitably be recovered elsewhere." Accordingly, the court required that the Commission, before granting an exemption from maximum rate regulation, must analyze the "actual revenue needs of the carriers involved," the "size of the revenue gains they would likely receive from the exemption," and "the degree to which needed revenue gains would be disproportionately subsidized by one group" (Pet.

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[18] The court found, looking at the language and legislative history of various provisions of the Act, that two factors—effective competition and revenue adequacy—were both "the reasons for deregulation" and *"the limits of deregulation"* (Pet. App. 41a (emphasis in original)). However, the conference committee report on the Staggers Act explicitly noted that the Commission may grant exemptions "wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition." H.R. Conf. Rep. 96-1430, *supra*, at 105. This demonstrates that Congress did not view the presence of "effective competition" as a "limit" on deregulation, and did not consider the absence of "effective competition" as an indication that there would be an abuse of market power. And there is no reason to suppose that revenue adequacy is a "limit" on deregulation either; that would imply, illogically, that when and if railroads become revenue adequate the full panoply of Interstate Commerce Act restrictions must be reimposed.

App. 45a). These are among the elements of a maximum rate case. See 49 U.S.C. 10707a. In effect, the court has required the Commission to determine that, if an exemption is granted, the resulting rates will conform to present regulatory standards of rate reasonableness, including the Long-Cannon factors.

This interpretation of the exemption authority is inconsistent with the congressional objective. The court improperly shifted the focus from whether continued maximum rate regulation is desirable to whether an unregulated market will guarantee the same results as maximum rate regulation. This assumes that Congress intended deregulation only where it would lead to no change in actual outcomes. Congress, however, formally determined that many rail regulations "have become unnecessary and inefficient" and that "a greater reliance on the marketplace is essential" to a sound transportation system (Staggers Act § 2(4) and (9), 49 U.S.C. 10101a note). The Staggers Act, in Rep. Staggers' words, was "intended to send a message to both the ICC and the courts that this law * * * is to be construed as the first step toward treating the American railroad industry as any other business, which is best 'regulated' by the marketplace." 126 Cong. Rec. 28431 (1980). Accordingly, the Commission was instructed to evaluate proposed exemptions against the standards of Sections 10101a and 10505(a), which have a strongly deregulatory emphasis. Moreover, the Commission was instructed to protect against abuses of market power "by reviewing carrier actions after the fact" under the revocation authority (H.R. Conf. Rep. 96-1430, *supra*, at 106; see *Brae Corp.* v. *ICC*, 740 F.2d at 1043; *American Trucking Ass'ns* v. *ICC*, 656 F.2d at 1127). The court of appeals here utterly ignored

the revocation authority, which is central to an understanding of the experimental approach to exemptions Congress envisioned.

Under the court's circular reasoning, any provision of the Interstate Commerce Act would be deemed to be needed (unless competitive forces would fully replicate it), since the "underlying logic" of each provision is impliedly incorporated in the exemption standards. To "read [the exemption standards] as reflecting the policies of the statutory scheme of which they are a part," as the court of appeals demanded (Pet. App. 44a), is to deny the exemption provision its intended role as an instrument for "experimental" and "innovative" policy *change*. See H.R. Rep. 94-725, *supra*, at 243.

The court's specific application of this reasoning is equally troubling. The key practical problem is that the court would require the Commission to base its exemption decisions on factors that can be determined only on a case-by-case basis. According to the court (Pet. App. 45a), the Commission must examine the revenue needs of *each* carrier affected by the exemption; it must predict, for *each* carrier, how much revenue it would receive if the exemption is granted. Finally, it must determine, with respect to each carrier, whether export coal shippers would bear a "disproportionate" share of the carrier's revenue needs. This would entail examining each carrier's rates and services not only in the export coal market, but in every market the carrier serves. Such a task is simply not feasible.

Some idea of the complexity of the analysis the court has prescribed can be gleaned by looking at individual rate reasonableness proceedings involving the Long-Cannon analysis. *E.g.*, *Public Service Co. of In-*

diana v. *ICC*, 749 F.2d 753 (D.C. Cir. 1984); *Potomac Electric Power Co.* v. *ICC*, 744 F.2d 185 (D.C. Cir. 1984). To say that such proceedings are complicated and protracted understates the case. Yet the court of appeals here would require the equivalent of simultaneous such proceedings for each of the hundreds of rates affected by an exemption. Even presuming that the court does not intend the inquiry to be conducted at the level of detail associated with an actual rate case, the project is of immeasurable complexity.

There is no legal basis for engrafting the standards and methodology of an individual rate case onto an exemption decision. Indeed, it is demonstrably contrary to congressional intent. Prior to 1980, the exemption authority was limited to transportation or services "of limited scope" (49 U.S.C. (Supp. IV 1980) 10505). That limitation was removed by the Staggers Act, precisely to enable the Commission to make exemptions of broad scope. It would be quite inconsistent to hold that the Commission must engage in an analysis that is appropriate only to individual rates. Further, in 1980 Congress removed the requirement that the Commission must give notice and conduct an informal rulemaking proceeding before granting an exemption. Although the legislative history does not explicitly explain the purpose of this change, it evidently was intended to make exemption decisions easier, more flexible, less encumbered. It would be quite inconsistent to hold that the Commission must engage in the tortuous process of determining the reasonableness of rates for the entire affected industry before issuing an exemption decision. Moreover, Congress created the revocation authority precisely to enable the Commission to act experimentally in the face of uncertainty; to deregulate

now and to correct any abuses that may occur "after the fact" by means of carefully-tailored revocations. *American Trucking Ass'ns* v. *ICC*, 656 F.2d at 1127; see *Brae Corp.* v. *ICC*, 740 F.2d at 1043. It would be quite inconsistent to hold that the Commission must determine, in advance, each of the rates that are likely to result from deregulation, and whether they are reasonable.

The court's interpretation is also contrary to administrative practice. In each of its exemption decisions, the Commission has relied on an analysis of competitive factors in the market and on its experience with the services in question to determine whether, in the given case, continued regulation is necessary to carry out the National Rail Transportation Policy or to protect shippers against an abuse of market power. Never has the Commission engaged in a rate reasonableness analysis (complete with Long-Cannon factors) before exempting a commodity from maximum rate regulation. The Commission has confined its analysis to the factors listed by Congress in Sections 10101a and 10505. This consistent administrative practice is entitled to deference. *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 27-28; *Udall* v. *Tallman*, 380 U.S 1, 16-17 (1965).

Finally, the decision below is inconsistent with a decision by the only court of appeals other than the District of Columbia Circuit to review an exemption decision. In *American Trucking Ass'ns* v. *ICC*, *supra*, the Fifth Circuit upheld the decision on the basis of the Commission's analysis of market factors and the congressional intention that the exemption power be used vigorously and experimentally. The court noted that Congress intended the Commission to "ex-

ercis[e] its exemption authority in the face of uncertainty as to the effect of an exemption," and to " 'review[] carrier actions after the fact to correct abuses of market power' " (656 F.2d at 1127, quoting H.R. Conf. Rep. 96-1430, *supra*, at 105). In contrast, the court of appeals here totally disregarded the evidence that export coal rates have in fact been restrained by market forces in the recent past, found the Commission's analysis of competitive constraints legally irrelevant, and failed even to acknowledge the existence of the Commission's revocation power.

CONCLUSION

The petitions for a writ of certiorari should be granted and the cases consolidated for argument.

Respectfully submitted.

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Nos. 84-884 and 84-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, ET AL.

NORFOLK AND WESTERN RAILWAY COMPANY, CHESSIE SYSTEM RAILROADS, AND SEABOARD SYSTEM RAILROAD, INC.
Petitioners,

v.

COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, ET AL.

On Petitions For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR RESPONDENTS EASTERN COAL TRANSPORTATION CONFERENCE AND COASTAL STATES ENERGY COMPANY IN OPPOSITION

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QUESTION PRESENTED

The Administrative Procedures Act (5 U.S.C. §706) charges courts reviewing administrative agency decisions to "decide all relevant questions of law, interpret . . . statutory provisions, and . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Typically, after a court detects and corrects an error of law the appropriate course is to send the matter back to the agency for reconsideration.

Applying this standard, the Court of Appeals vacated and remanded a decision of the Interstate Commerce Commission which purported to exempt from all regulation the rail transportation of export coal. The court took this action because the ICC, in exercising its authority under 49 U.S.C. §10505, had based a critical conclusion—that continued regulation was not necessary to protect export coal shippers from abuse of railroad market power—on a construction of that statutory concept that failed to reflect, and actually conflicted with, the standards and policy goals established by Congress to protect shippers exposed to railroad market power.

The question presented in this case is:

> Whether the Court of Appeals was within its authority in vacating an ICC decision relying upon a construction of the statutory concept of "abuse of market power" which conflicted with applicable legal standards and policies prescribed by Congress.

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Nos. 84-884 and 84-885

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COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS EASTERN COAL TRANSPORTATION CONFERENCE AND COASTAL STATES ENERGY COMPANY IN OPPOSITION

Respondents Eastern Coal Transportation Conference ("ECTC") and Coastal States Energy Company ("Coastal") oppose the requests by Petitioners Interstate Commerce Commission ("ICC" or "Commission") and Norfolk & Western Railway Company, et al. ("Railroads") for issuance of a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit.

STATEMENT

In the decision below, a unanimous panel of the Court of Appeals found that the Interstate Commerce Commission—in applying 49 U.S.C. §10505 to exempt from the Interstate Commerce Act the rail transportation of coal bound for export—had provided inadequate support for a critical element of its decision: that export coal shippers subject to railroad market power would not be exposed to abuse of that power, i.e., to unreasonable rates, in the absence of regulation (Pet. App. 75a, 83a-84a, 87a). The court based its conclusion principally on the fact that the Commission, in finding[1] that shippers would not be subject to abuse of rail market power, and thus that rail rates on export coal would not exceed reasonable levels, gave no consideration to the factors prescribed by Congress for use in determining whether railroad rates are "reasonable." It likewise did not discuss how the policy goals reflected in those statutory standards would be met absent regulation. Instead, the Commission erroneously applied a test which is in conflict with the Interstate Commerce Act, without offering an explanation as to the basis for its use or its consistency with Section 10505. The Court of Appeals, after explaining these errors (Pet. App. 36a-45a), *vacated*[2] the agency's decision and *remanded* the matter for further proceedings.

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[1] Pursuant to 49 U.S.C. §10505(a)(2)(B).

[2] In its Petition, the Commission characterizes the Court of Appeals' action as a reversal, and a "judicial repeal" of Section 10505, apparently in an effort to portray that action as precluding the Commission from ever granting exemptions of the type at issue here. *See*, e.g., ICC Pet. at 8, 12, 13. The Commission's apparent need to mischaracterize this aspect of the Court of Appeals' decision implies the erstwhile absence of legitimate cause for intervention by this Court. *See* pp. 16-20, *infra*.

A. The Staggers Rail Act and Congress' Concern for Coal

In recent years, railroads and the ICC have urged a one-dimensional view of the Staggers Rail Act of 1980;[3] to wit, that its only purpose was to deregulate the railroad industry. That view is faithfully repeated before this Court. See ICC Pet. at 2-5; Railroads' Pet. at 6-7. As the Court of Appeals recognized, however (Pet. App. 8a-9a), Congress had more in mind.

While one of its goals was to reduce regulation where the railroads face competition, Congress also was careful to retain regulatory protection (particularly in the rate area) for shippers that remained subject to rail market power. See S. Rep. No. 96-470, 96th Cong. 1st Sess. 17 (1979); H.R. Rep. No. 96-1035, 96th Cong. 2d Sess. 38-39 (1980); 126 Cong. Rec. 28233 (1980). The bill that was finally signed by President Carter represented a compromise in the classic sense, designed to "provide a regulatory process that *balances* the needs of carriers, shippers, and the public." H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 80 (1980) (emphasis added); see also 126 Cong. Rec. 28433-34 (1980).

Of all the commodities shipped by rail, none received more attention during the deliberations over the Staggers Act than coal. Noting the "many substantial [rate] increases imposed on this traffic in the last several years,"[4] Congress served notice that coal shippers—both domestic and export—were not to be the beasts of burden in a drive for railroad profits. Thus, in its only substantive comment on the new Rail Transportation Policy (49 U.S.C. §10101a), the Committee on Conference on the Staggers Act wrote:

> The Conferees intend that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy

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[3] Pub. L. No. 96-448,94 Stat. 1895 (1980).

[4] S. Rep. No. 96-470, *supra* at 7.

> independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.

H.R. Rep. No. 96-1430, *supra* at 80.

It was in the context of this policy of balancing interests that modifications were made to the standards governing the Commission's exemption authority. The Senate Commerce Committee, for example, took pains to point out that shipper rate protections were not to be forfeited through the use of that authority:

> [A]s noted above, the Commission may not grant exemptions which are beyond the "limited scope" language of existing law if continued regulation is needed to "protect shippers from the abuse of market power." The purpose of this language is to reemphasize the Committee's concern that greater use of the exemption power should not be at the expense of captive shippers who have no reasonable transportation alternatives.

S. Rep. No. 96-470, *supra* at 43.[5] The Committee on Conference also made it clear that the Commission's exercise of its exemption power was to reflect the general statutory and policy framework of the Staggers Act *as a whole*:

> The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices *not yet addressed by Congress* to determine where they can be deregulated *consistent with the policies of Congress*. The conferees expect

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[5] A key Staggers Act sponsor echoed this theme, with specific reference to export coal movements:

> As coal production and coal markets grow in the future, any boom for both the coal industry and the railroad industry with its related increase in employment of men in both fields, will never be achieved unless domestic rail rates are kept at reasonable levels to permit U.S. coal to compete in world markets.

126 Cong. Rec. 24825-26 (1980).

> that, *consistent with the policies of this Act*, the Commission will pursue partial and complete exemptions from remaining regulation.

H.R. Rep. No. 96-1430, *supra* at 105 (emphasis added). Congress made it plain that in determining, e.g., whether continued regulation is "necessary to protect shippers from abuse of market power," the Commission cannot be oblivious to relevant standards and policies lodged elsewhere in the Act. They are both guidelines for and restraints on the proper exercise of the exemption power.

B. The Commission's Decision

Shortly after the filing by export coal shippers of a comprehensive challenge to the rates on virtually all movements of export coal,[6] the Norfolk & Western Railway Company—the Nation's principal carrier of export steam coal—petitioned the Commission to exempt from all provisions of the Interstate Commerce Act export coal movements bound for Atlantic and Gulf ports. The petition was supported by the Chessie System and Family Lines Railroads (both are now part of CSX Corporation)—the Nation's principal haulers of metallurgical export coal.[7]

Opponents of the exemption[8] submitted evidence which showed most export coal to be subject to rail market power.

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[6] ICC Docket No. 38301S; *see* ICC Pet. at 7 n.6.

[7] Steam coal is primarily used for the generation of electricity, while metallurgical or "coking" coal is essential to the steel production process. *See* Pet. App. 54a. The Norfolk & Western handles over 90% of all eastern steam coal exports (Pet. App. 21a n.12). In 1980, CSX carriers handled 81% of all "met" coal exports (Pet. App. 21a n.12). This market division with Norfolk & Western is stark in light of the Commission's finding that each is the near-exclusive handler of its respective share: "[c]oal originating on the lines of an eastern rail carrier is generally transported in single-line service to that carrier's own export coal facility." Pet. App. 61a.

[8] Comments in opposition were filed by coal producers and producer organizations, shippers, domestic utility companies, ports, the ICC's

In the absence of regulation, these shippers would be exposed to abuse of that power (principally in the form of unreasonable rates), notwithstanding that the world buying market imposed an upward limit on delivered export coal prices. Supporters of the exemption, on the other hand, claimed that railroads did not enjoy market power over shippers in most instances.[9] Even where such power was present, they argued, the world market "cap" together with the railroads' economic self-interest would prevent carriers from raising rates to the point where producers left the market or went out of business.[10] So long as rail rates did not cause declines in overall export volume, the proponents argued, the railroads would not be "abusing" their market power.[11]

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own Office of Special Counsel, the U.S. Departments of State and Commerce, and the U.S. Trade Representative. Parties supporting the exemption included the petitioning railroads and the U.S. Department of Transportation (Pet. App. 51a).

[9] The carriers argued that even though 95% of the mines producing coal for export were captive to a single railroad, market power was not present since the companies that operated them controlled export mines located on different carriers as well. *See* Pet. App. 19a-20a. Opponents countered with evidence showing that only 24% of the mines served by the eastern carriers were controlled by companies that also controlled mines on other railroads. *See* Pet. App. 21a-22a.

[10] Proponents also pointed to a comparison of export coal prices and rail rates which showed that between 1969 and 1981 the former had risen more than the latter. *See* Pet. App. 25a. As opponents noted, however, railroads were heavily regulated prior to 1976. From *1976* to 1981, utilizing new rate freedoms, carrier rates on metallurgical coal rose by 59.5%. During the same period, minehead prices for the same product *declined* by almost 9%. *See* Pet. App. 26a n.17.

[11] It is important to note that in the area of rates—the principal focus of this case—an exemption under Section 10505 is wholly unnecessary to free carriers without market power from regulation. Congress already achieved that objective through the enactment of Section 10709, which prohibits the ICC from exercising jurisdiction over any rates that are not set by carriers possessing "market dominance" over the traffic in question. Moreover, *any* carrier—regardless of market power—is free

On March 3, 1983, the ICC announced that it had voted 3-2 to grant the full exemption proposed by the Railroads. An opinion explaining the decision was served three months later.[12]

Accompanied by a vigorous dissent by Chairman Reese H. Taylor, Jr., the Commission's opinion based the exemption on grounds substantially the same as those asserted by the Railroads.[13] Concluding that a "substantial" number of export shippers "often" are able to take advantage of competitive alternatives (e.g., Pet. App. 61a, 74a, 84a), the Commission rejected claims of complete railroad market power over export coal traffic. Acknowledging, however,[14] that an

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to *lower* its rates at any time, subject only to a floor set according to its directly variable cost of service. In practical terms, therefore, the principal effect of an exemption in this case would be to grant railroads the unfettered right to raise rates on export coal traffic over which they exert market power, without the threat of regulatory intervention should shippers object.

[12] The draft decision initially prepared for the Commission by the ICC staff concluded that the exemption should *not* be granted (Pet. App. 114a). Preparation of a new decision—supporting the result of the vote—caused the delay.

[13] The similarities between the ICC's findings and the Railroads' arguments were noted by Chairman Taylor: "I appreciate the majority's summation of the proponent railroads' comments but feel that perhaps a more neutral approach would provide a better basis on which to rationally decide this important case." (Pet. App. 92a).

[14] The Commission's handling of rail pricing under an exemption assumes significant rail market power over export coal traffic. Throughout its decision (Pet. App. 66a, 78a, 83a-84a), the Commission cast the Railroads' future pricing in the context of first-degree price discrimination, a model which is only applicable to firms with substantial market power. *See* R. BORK, THE ANTITRUST PARADOX 395 (1978); R. POSNER, ANTITRUST LAW 63 (1976). Implicit acknowledgement of rail market power is also evident from the fact that for all its discussion of competition, the Commission based its decision on its view of the potential for abuse, rather than on an absence of market power itself. Moreover, the Commission went to pains to distance itself from a finding of a completely competitive environment, concluding that "the

undetermined number of export shippers *were* subject to rail market power, the Commission justified the exemption on the basis of its conclusion that an exemption was not likely to lead to an abuse of that power. See Pet. App. 82a.

The Commission's discussion focused on market power abuse in the form of unreasonable rates, which in turn would impact upon the allocation of available export coal "rents" between shipper/producers and carriers (Pet. App. 65a, 82a-84a). In concluding that export coal rates under an exemption would not rise to unreasonable levels, however, the Commission did not rely on the reasonable rate standards and policies reflected in either the Interstate Commerce Act (e.g., 49 U.S.C. §§10704(a), 10707a(e)(2)(C)) or the Commission's own *Coal Rate Guidelines*.[15] Its conclusion instead was based on the railroads' self-interest and the so-called "world price cap." Pet. App. 83a. So long as producers were able to sell coal at prices sufficient to cover costs and stay in business, the Commission found, railroad rates would be "reasonable" and rail market power would not be abused (Pet. App. 83a-84a).

C. The Court of Appeals Decision

The point on which the Court of Appeals' unanimous decision turned was quite narrow. The court held the Commission could not conclude that absent regulation traffic subject to rail market power would not be subject to abuse, i.e., the imposition of unreasonable rates, without offering an explanation that reflected the standards and policies

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issue is not whether deregulation will give the railroads *some* market power but whether we conclude that an exemption will result in abuse." Pet. App. 82a (emphasis in original).

[15] Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines—Nationwide*, Decision served February 24, 1983.

prescribed by Congress for consideration in determining rate reasonableness (Pet. App. 44a-46a).[16]

The court began with a discussion of the opposing parties' positions on the subject of competition (Pet. App. 11a-26a). While noting that an exemption could be grounded upon a finding of an absence of railroad market power (Pet. App. 28a), the court observed that in this case the Commission had not made such a finding. Instead, the Commission had acknowledged the existence of rail market power over segments of export coal traffic, with the case turning on the potential for "abuse" (Pet. App. 28a-31a).[17]

The Court of Appeals therefore focused on an examination of the standard used by the Commission in arriving at its central finding on the issue of market power abuse: that export coal rates under an exemption would be "reasonable" (Pet. App. 27a, 36a-38a).

The court rejected the Commission's conclusion that the "abuse of market power" test of Section 10505(a)(2)(B) could be satisfied through application of a standard which ignored the level of rates charged by railroads exercising market power "so long as coal shippers are not forced to reduce production (i.e., so long as the rail rate leaves them a share of the revenue that covers their costs . . . ") (Pet. App. 37a). This view, which the court characterized as regulatory "indifference," was wholly inconsistent with the standards and policies prescribed by Congress for measuring rate reasonableness (Pet. App. 44a). Particularly as set forth in the

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[16] These standards and policies are set forth in, e.g., 49 U.S.C. §10704(a)(2), 10701a(e)(1) and 10707a(e)(2)(C). In 1983, the Commission proposed a methodology of general application for use in implementing these standards in the context of captive coal traffic in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines—Nationwide*, *supra*.

[17] The Court based this observation on the Commission's own framing of the issue (Pet. App. 82a; note 14, *supra*), and on its extensive use of the first-degree price discrimination model to predict future railroad rate behavior (Pet. App. 29a-31a).

so-called "Long-Cannon Amendment" (49 U.S.C. §10707a(e)(2)(C)) and Section 10707a(e)(1)'s admonition against "excessive profits," these standards effectuated Congress' intent to "limit the rate freedom of carriers with market power" (Pet. App. 42a), and maintain a balance in shipper-carrier relations under the Staggers Act (Pet. App. 45a). Because Congress had decreed these policies to be factors in *all* rate reasonableness determinations, the Commission could not ignore them altogether in its generic evaluation of rates on export coal under Section 10505(a)(2)(B) and the National Rail Transportation Policy (49 U.S.C. §10101a(6)) (Pet. App. 42a-45a). Those provisions instead "should be read as reflecting the policies of the statutory scheme of which they are a part" (Pet. App. 44a). To give effect to Congress' policy as reflected in that statutory scheme, the court concluded, vacation and remand was required (Pet. App. 47a).

ARGUMENT

The Court of Appeals' decision was a reasonable and properly limited exercise of judicial authority which neither raises a serious federal question nor conflicts with prior decisions of this Court or the courts of appeals of other circuits. The decision has no real impact beyond the four corners of this case, has no effect on any other statute or statutory provision, and raises no new barriers to the proper exercise of ICC authority under 49 U.S.C. §10505. Particularly in light of the fact that the entire matter is now back before the ICC on remand, and is therefore far from final in any practical sense, this case presents a wholly inappropriate object for investment of this Court's time and resources. The Petitions for Writ of Certiorari should be denied.

I

THE COURT OF APPEALS DECISION WAS A REASONABLE AND PROPERLY LIMITED EXERCISE OF JUDICIAL AUTHORITY WHICH RAISES NO SUBSTANTIAL FEDERAL QUESTION

Export coal shippers may be divided into two groups: those that enjoy competitive transportation alternatives, and those that are subject to rail market power. This case deals solely with the second group, and the Commission's conclusion that rates on their traffic—in the absence of regulation—will be "reasonable." Finding that the only standard articulated by the ICC in reaching this conclusion was inadequately explained and legally deficient under the Act, the court remanded for further consideration. This action—which constitutes the sum and substance of the court's involvement—raises no substantial federal question as would justify intervention by this Court. Rather, it bears all the marks of an ordinary agency review proceeding.

As noted by the Court of Appeals, the Commission could have based its decision on a finding the railroads do not possess market power over export coal shippers (Pet. App. 28a).[18] The Commission, however, did *not* make such a finding; its conclusion under Section 10505(a)(2)(B) was that notwithstanding rail market power over a segment of export coal shippers,[19] continued application of the Interstate Commerce Act was not necessary to prevent abuse

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[18] The Railroads have attempted to turn this observation into a separately-imposed prerequisite to exemption (Railroad Pet. at 20-22), but a plain reading of the opinion shows the court was merely stating the obvious: there can be no abuse of market power if there is no market power (Pet. App. 28a).

[19] The parties below clearly differed as to the magnitude of this power, but all acknowledged—in one way or another—its existence. For its part, the Commission showed its presumption of market power through repeated references to a rail pricing theory that can only be used by companies with substantial market power (Pet. App. 66a, 75a,

(Pet. App. 82a, 85a-87a).[20] The Court of Appeals therefore looked for the Commission's explanation of how those shippers *who do not benefit from competition* would be protected from abusive rate and service practices (Pet. App. 36a-37a).

What the court found was a discussion of market power abuse which focused principally on the question of rates; i.e., whether rates on export coal traffic subject to rail market power would be "reasonable."[21]

78a-79a, 83a, 84a, 86a) and its specific avoidance of a conclusion that the railroads do not possess market power over export coal (Pet. App. 82a).

[20] It is here that this case differs from two decisions which feature prominently in the Petitions and the United States' Brief: *American Trucking Ass'ns.* v. *I.C.C.*, 656 F.2d 1115 (5th Cir. 1981) and *Brae Corp.* v. *I.C.C.*, 740 F.2d 1023 (D.C. Cir. 1984). In *ATA*, the exemption for trailer-on-flatcar traffic "was based primarily" on the ICC's findings of extensive inter- and intramodal competition and an absence of rail market power. *See* 656 F.2d at 1115. Additionally, the exemption there at issue was *specifically contemplated* by Congress in enacting the Staggers Act. *See* 49 U.S.C. §10505(f). Similarly, in *Brae* the "linchpin" of the ICC's exemption finding with respect to rates charged shippers was "the presence of pervasive truck competition—its conclusion that goods transportable by boxcars can also, in the vast majority of cases, be carried by trucks." 740 F.2d at 1036.

The ICC seeks to draw additional parallels between this case and *Brae* based upon the latter's conclusions regarding the relationship between large and small rail carriers in the area of joint rate divisions (ICC Pet. at 12). What the ICC fails to point out, however, is that Section 10505(a)(2)(B) mandates consideration of the treatment of *shippers* by railroads possessing market power. There is no similar mandate vis-a-vis the interests of small *carriers*. What may have been judicial overreaching in *Brae*, therefore (a point not at issue here), was fully consistent with the applicable statute in this case.

[21] This focus was entirely appropriate, given the policy favoring reasonable rates set forth in Section 10101a(6) and the Conference Report on the Staggers Act (H.R. Rep. No. 96-1430, *supra* at 80), the attention given the issue in the comments of opponents of the exemption, and its status as the policy goal most threatened by the exemption. In addition, as noted in *Brae*, the presence of unreasonable rates is a clear "symptom" of market power abuse. *See* 740 F.2d at 1036.

The standard employed by the Commission in answering this question, however, was unlike anything which appears in the Act's provisions regarding maximum reasonable rate evaluations, or the ICC's own pending coal rate policy proposal (*Ex Parte No. 347 (Sub-No. 1), supra*). Without any explanation of its basis or rationality under the Act, the Commission made the determination that:

> the issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate *all* of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

Pet. App. 83a (emphasis supplied).[22]

Since the Commission relied upon this standard in construing the mandate of Section 10505(a)(2)(B),[23] proper discharge of the court's duty under the Administrative Procedures Act required that it carefully consider that standard

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[22] The United States denies that this was considered by the ICC to be a "standard" for market power abuse (United States Br. at 16, 18), and further contends that the Commission was under no obligation to articulate such a standard (*id.* at 20 n.17).

The United States' first point is met not only by the quotation in the text, wherein the Commission clearly postulates its view as to what would constitute market power abuse (i.e., its "standard"), but by the ICC's own Petition before this Court, which describes how "[t]he ICC articulated the legal standard of 'indifference' to particular rate levels . . ." (ICC Pet. at 17). The Government's second point is incorrect as a matter of law. The ICC's central substantive finding in this case was that there would be no abuse of railroad market power. Without articulating a standard of *any* sort, the ICC would be leaving no discernable "path" for a court to follow on review. Remand would be necessary as a matter of course. *Cf. Bowman Transp., Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974); *Yonkers* v. *United States*, 320 U.S. 685 (1944).

[23] In its Petition, the ICC offers an alternative "standard," whereunder future rates would be found reasonable because it could be assumed they would be "similar to those in the past." ICC Pet. at 17. The fundamental problem with this "standard" is that it presumes the

within the framework of the Act as a whole,[24] and set it aside if it was found to rest on an "erroneous legal foundation." *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956).

The court's conclusion that the standard employed by the ICC *was* legally erroneous was clearly correct. In blessing as "reasonable" any rate which was not so high as to preclude a shipper from covering his costs, and thus force him out of business (Pet. App. 37a), the Commission had endorsed a standard that would at most guard only against grossly exploitive railroad pricing. Such a position is an abdication of the agency's responsibility vis-a-vis the maintenance of "reasonable" rates. See *Farmers Union Central Exchange* v. *F.E.R.C.*, 734 F.2d 1486, 1503-04 (D.C. Cir.), *cert. denied* 105 S.Ct. 507 (1984).[25] The ICC and the United States (ICC Pet. at 15; United States Br. at 17) object to the Court of Appeals requiring the Commission—if it is simply to rely on competition to keep rates (including those on traffic

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reasonableness of rates that are presently under challenge before the ICC (in *Docket No. 38301S*), then uses that presumption to justify an exemption for those same rates, the effect of which is to preclude a final decision adjudicating their reasonableness. Since the ICC also maintains it is under no obligation to consider the standards and policies of the Act regarding reasonable rates in using Section 10505 to exempt traffic from rate regulation (ICC Pet. at 18-22), the logical outgrowth of this Catch-22 is the absurd scenario whereunder the best defense to the filing of a complaint challenging the reasonableness of a rail rate is a petition to exempt that rate from regulation.

[24] *See U.S.* v. *Morton*, ___ U.S. ___, 105 S.Ct. 2769, 2773 (1984); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Richards* v. *U.S.*, 369 U.S. 1, 11 (1962).

[25] As Judge Wald there recognized, an agency cannot simply "pour any meaning" into the term "reasonable." There must be a recognition of the statutory guidelines provided elsewhere in the Act, and respect for the concept of fair divisions of revenues between shippers and the carriers upon whom they depend. *Farmers Union*, *supra* 734 F.2d at 1504-05.

subject to market power) reasonable—to explain "in non-conclusory terms" the conditions that would protect against abuse of market power through the imposition of unreasonable rates (Pet. App. 46a), and how those conditions would be met. This objection, however, must be rejected: an agency cannot simply recognize a "ceiling" and a "floor" and leave the establishment of reasonable rates to "market forces" without explaining how those forces will produce reasonable rates. *Farmers Union, supra* 734 F.2d at 1510; *F.P.C.* v. *Texaco*, 417 U.S. 380, 399 (1974).

It is axiomatic that agency determinations must be consistent with relevant, applicable statutory standards and policies in order to pass judicial muster. See *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 691 (1943); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-69 (1962). Thus, in evaluating the Commission's standard of "reasonableness" in the present case, the Court of Appeals quite properly looked to whether the ICC's views "reflect[ed] the policies of the statutory scheme of which they are a part" (Pet. App. 44a).[26] As to shippers subject to market power, the ICC's standard was clearly lacking. Except for a passing reference to the promotion of railroad "revenue adequacy" (Pet. App. 75a), the ICC provided no explanation at all of how its "regulatory indifference" standard would lead to rates that are a reasonable reflection of the maximum rate standards and goals established in the Interstate Commerce Act. No regard was given, for example, to the ban on "excessive profits" (Section 10707a(e)(1)), the prohibition against inequitable and inefficient distribution of a carrier's

[26] The United States' Brief argues for consideration of Section 10505 in isolation from the standards and policies of the rest of the Act (United States Br. at 23). Such a procedure, however, is not only contrary to established principles of statutory construction (*see, e.g., U.S.* v. *Morton*, ___U.S.___, 104 S.Ct. 2769, 2773 (1984)), but is rejected by the legislative history of Section 10505 itself, which speaks of the ICC using its power under that section in a manner "consistent with the policies of this Act." H.R. Rep. No. 96-1430, *supra* at 105.

revenue burden (Section 10707a(e)(2)(C)(iii)), or the minimization of non-compensatory and marginal traffic (Section 10707a(e)(2)(C)(i) and (ii)). To the contrary, the Commission's theory dismissed as irrelevant any concern for actual rates below the level at which the railroad would appropriate "all of the economic rents" (Pet. App. 83a).

This conflict between the Commission's standard of rate reasonableness under Section 10505 and the standards and policies prescribed by Congress made it doubly important that the Court of Appeals seek out and carefully review the ICC's explanation of the reasons for its adoption of the course it chose to pursue. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-09 (1973); *Burlington Truck Lines, supra* 371 U.S. at 168. The ICC, however, had provided no explanation at all (Pet. App. 40a). The court thus had no choice but to vacate the decision. See *Motor Vehicle Manufacturers Ass'n.* v. *State Farm Mutual Automobile Insurance Co.*, ___ U.S. ___, 103 S.Ct. 2856, 2867 (1983); *Industrial Union Dep't. AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 631-32 (1980); *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).[27]

In its Petition, the ICC maintains that the court should have "deferred" to the agency on the question of reasonableness—notwithstanding the absence of any explanation of the basis for the ICC's non-conforming standard—and vacated the decision "only if it was certain that rates after the exemption would in fact be unreasonable (i.e., an abuse of market power)." ICC Pet. at 16. Such would not be deference; for the Court of Appeals to have looked the other way while the ICC employed a standard that conflicts both with

[27] The fact that the agency was making a "predictive" finding as to future rate levels does not excuse its ignorance of the standards established by Congress, or its failure to provide "an adequately articulated administrative decision interpreting the relevant statutory law within a range of reasonableness." *Northern Colorado Water Conservancy District* v. *F.E.R.C.*, 730 F.2d 1509, 1517 (D.C. Cir. 1984).

the Act and general administrative principles would have been a total abdication of its judicial responsibility. "Deference" would have "slip[ped] into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, ___U.S.___, 104 S.Ct. 439, 444 (1983). It is the ICC's proposed standard of "review," not the Court of Appeals' interpretation of Section 10505, that raises the substantial federal question in this case. On a matter which is indisputably subject to judicial review (i.e., an ICC exemption decision), the Commission effectively would immunize its determinations—regardless of their inconsistency with governing law—by requiring a court to make a finding that is acknowledged to be beyond its purview: that a rail rate is "unreasonable." *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131, 138-42 (1982).

The action by the court below was fully consistent with established principles of judicial review, was correct in the context of the issue at hand, and resulted in the merits of the exemption itself being placed back in the hands of the ICC, where they belong. No serious federal question is presented, and the case for intervention by this Court has not been made.

II

THE COURT OF APPEALS DECISION DOES NOT MATERIALLY IMPAIR THE FUTURE EXERCISE OF THE ICC'S EXEMPTION AUTHORITY

Claims are raised that the Court of Appeals decision "cripples" the ICC, and imposes new restrictions on the use of Section 10505 "so onerous as to effectively preclude future use of the exemption power." ICC Pet. at 18; Railroad Pet. at 18. See also United States Br. at 20. In point of fact, the

decision imposes no such restrictions, and raises no new material impediment to the ICC's exercise of its exemption power.

In reviewing the ICC's conclusions regarding future rates on coal traffic subject to rail market power, the Court of Appeals did not "write into" Section 10505 any requirement of "predictive" individual maximum rate determinations, *in gross* analyses under the Long-Cannon Amendment, or "guarantees" of fair divisions of economic rents. Rather, the subject of the court's analysis was the rate prediction which the ICC had *already* made (Pet. App. 74a-75a, 85a, 87a). In that context, the court found those predictions were based upon a standard which "measured" reasonableness without defining it, and effectively ignored the actual level of export coal rates so long as they were not so high as to put shippers out of business (Pet. App. 38a).[28] This is wholly at odds with the statutory scheme developed by Congress for striking a proper balance between captive shipper and carrier interests (e.g., 49 U.S.C. §§10704(a), 10707a(e)(1), 10707a(e)(2)(C)), and thus could not be approved. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, ___ U.S. ___, 104 S.Ct. 2778, 2782 n. 9 (1984); *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). Because the ICC had offered no other basis for its conclusion that rates would remain reasonable and captive shippers free from market power abuse[29] (Pet. App. 46a), remand was

[28] The zone of reasonableness under the ICC's decision is simply "an area between an individual mine's longrun marginal cost of extraction at the current cost of capital and the world market price" (Pet. App. 86a). For shippers without competitive alternatives, this "zone" is really a license to engage in classic monopoly pricing. *Cf. United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[29] The ICC's findings regarding the effects of alleged competitive forces by definition have no application to shippers whose rates the ICC expects will be set pursuant to the Railroads' first-degree price discrimination model. *See* Pet. App. 31a-32a.

necessary. See *Michigan Consol. Gas. Co.* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir.) *cert. denied* 364 U.S. 913 (1960).

In referring to, e.g., the Long-Cannon Amendment and the revenue adequacy standard (Pet. App. 41a-43a), the court was explaining by way of contrast why the ICC's standard of "regulatory indifference" was incompatible with the policies of the Act. It was not purporting to impose new preconditions to the granting of an exemption, or "eviscerating" Section 10505 (*see* Railroad Pet. at 21). To the contrary, its opinion ensures that Section 10505 will not itself be used to eviscerate the overall policy goals of the Act,[30] and that the ICC will instead pursue exemptions which can be granted "*consistent with the policies of Congress.*" H.R. Rep. No. 96-1430, *supra* at 105 (emphasis added). The court's decision imposes one and only one "burden" on the ICC on remand: to *explain* how its action complies with the governing statutory framework. Such is not an "evisceration;" it is the duty of every reviewing court. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968).

When an agency has made an error of law, the court's duty is to correct the error and remand to the agency, "so as to afford it the opportunity of examining the evidence and finding the facts as required by law."[31] On remand, however, the agency is in no way foreclosed from acting consistent with its assessment of relevant questions of fact and

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[30] As the Court of Appeals acknowledged, the concept of rate reasonableness "is a complex one and one whose precise definition was generally left to ICC." Pet. App. 39a. Courts cannot, however, "rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291-92 (1965).

[31] *N.L.R.B.* v. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of*

policy (even to the point of reaching the same result), so long as the court's mandate is not violated. *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965); *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 373-74 (1939). These principles are firmly respected in the opinion below. So long as the ICC's view of market power abuse is consistent with the standards and policies prescribed elsewhere in the Act, there are no restrictions on the Commission's future action in this case. The ICC is free to deny, grant in part, or grant in full the exemption for export coal traffic.[32]

The decision below raises no new impediments to the exercise of the ICC's exemption authority in other areas, either. As Chairman Taylor explained:

> [F]rom a legal standpoint, the Circuit Court's decision will have no adverse precedential impact, and . . . as a result, the decision will not impede our continued use of the Staggers Act exemption provision to properly deregulate the railroad industry.
>
> The fact of the matter is the Circuit Court merely reaffirmed the mandate from Congress, as set forth in the Staggers Act, that we consider and balance all relevant competing interests in determining whether an exemption falls within the ambit of the National Transportation Policy. Accordingly, the judicial decision does not, in any way, limit the scope of a proposed exemption; instead, it merely directs us, in our deliberations, to perform the necessary balancing of interests intended by Congress.

Notation Vote Memorandum to the Commission from Chairman Reese Taylor, October 10, 1984, *attached to* Opposition To Motions For Stay of Issuance of Mandate Pending Petition For Writ of Certiorari, *Coal Exporters Ass'n., et al.* v. *I.C.C.* (D.C. Cir. No 83-1629), filed October 29, 1984.

New York and Vicinity, Local Union No. 638, 429 U.S. 507, 522 n. 9 (1977) (*quoting I.C.C.* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)).

[32] *See Food Marketing Institute* v. *I.C.C.*, 587 F.2d 1285 (D.C. Cir. 1978); *Chicago & N.W. Transp. Co.* v. *U.S.*, 574 F.2d 926 (7th Cir. 1978).

Chairman Taylor's observations aptly describe the effect—the entire effect—of the Court of Appeals decision. To be sure, the court vacated the exemption in this particular instance because of a legal error in the Commission's analysis of market power abuse. Upon correction of the error, however, the agency is left with as much discretion and administrative freedom as it enjoyed before. The only lasting admonition by the Court of Appeals is that which already lies at the heart of Section 10505: that the ICC's pursuit of exemptions under the Act be conducted in a manner "consistent with the policies of Congress." H.R. Rep. No. 96-1430, *supra* at 105.

III

THE COURT OF APPEALS DID NOT SUBSTITUTE ITS POLICY JUDGMENT FOR THAT OF THE ICC

The Railroads incorrectly claim that the court "exalted one element of the [national transportation] policy over all others: the policy of assuring 'reasonable' rates where there is an absence of effective competition. 49 U.S.C. §10101a(6)." Railroad Pet. at 28. The court devoted some discussion to Section 10101a(6) because the ICC had effectively *ignored* that policy goal—the only one of the fifteen elements of Section 10101a directed specifically to the interests of captive shippers.[33]

Despite the fact that it was the policy provision "most clearly related to petitioners' claims" (Pet. App. 34a), and was argued extensively before the Commission by ECTC, Coastal and numerous other opponents of the exemption,[34] the ICC gave no substantive consideration to Section

[33] As the court noted, "[t]he Commission mentioned Section 10101a(6) only once in its opinion, and then in a footnote that implied that the provision was inapplicable." Pet. App. 35a.

[34] The United States, without any support whatsoever, asserts that the "element [of §10101a] most stressed by opponents of the exemption"

10101a(6) in its decision. The Court of Appeals was quite justified in finding this omission "troubling" (Pet. App. 35a), for it is well-settled that an agency which solicits public comments on a proposal has an obligation to respond to significant points raised by the participants.[35]

Moreover, in addressing the role of Section 10101a(6), the court did no more than affirm that under Section 10505(a)(1) *all* relevant elements of the National Transportation Policy—including Section 10101a(6)—are to be given *co-equal* consideration (Pet. App. 35a-36a n. 22).[36] This is important, since the plain language of Section 10505(a)(1) effectively prohibits the granting of an exemption where the result would be contrary to any of the enumerated goals.[37] The Court of Appeals did not purport to give Section 10101a(6) paramount consideration in the analysis under Section 10505(a);[38] it simply made clear that on remand the

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was Section 10101a(13), which speaks to predatory pricing and practices (United States Br. at 5). One is at a loss to explain why the United States has offered this inaccurate statement, unless it relates to the fact that while the ICC ignores Section 10101a(6) in its decision, it does devote three pages of discussion to Section 10101a(13).

[35] To do otherwise is to render meaningless the opportunity to comment, and preclude a reviewing court from determining whether all relevant factors have been considered by the agency. *Home Box Office, Inc.* v. *F.C.C.*, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied* 434 U.S. 829 (1977); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

[36] Even the Railroads do not dispute that consideration of all elements of Section 10101a is incorporated into the standards of Section 10505(a). *See* Railroad Pet. at 28.

[37] Section 10505(a)(1) permits an exemption when regulation is "not necessary to carry out" the National Transportation Policy. While this standard may not require that every goal be actively furthered by an exemption, it cannot be met if the exemption would *defeat* any of them—regulation in such a case would be "necessary" to carry out the goal(s) in question.

[38] It would have been justified in giving the exemption's consistency with Section 10101a(6) heightened scrutiny, however, given that it relates to an area that strikes at the heart of the ICC's decision, was argued

ICC cannot brush it aside with the blithe (and unsupported) assertion that "[e]xport coal traffic is not the captive traffic for which Congress continued rate regulation" (Pet. App. 71a n. 32).

The ICC's Petition purports to draw parallels between this case and *F.C.C.* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981) (ICC Pet. at 22-25). There are, however, significant—and indeed dispositive—distinctions between the two. In *WNCN*, the "policy" which the court of appeals improperly sought to require the FCC to apply was court-made; it was not compelled by the Communications Act (see 450 U.S. at 593). Here, by contrast, the policy of "reasonable rates in the absence of effective competition" is not only compelled by the Interstate Commerce Act itself, but its relevance and purpose are well-documented in the legislative history of the Staggers Act,[39] and its role in the exemption process under Section 10505 is not seriously disputed.[40] See, e.g., Railroad Pet. at 28. In requiring that the ICC give effect to Section 10101a(6) on a scale equal to that given other goals (e.g., the promotion of revenue adequacy), the Court of Appeals was not "substitut[ing] its own view of how best to accommodate the competing interests," (ICC Pet. at 24). It was ensuring, consistent with its proper role, that the ICC's

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extensively by the parties below, and was singled out for special concern by the House-Senate Conference Committee on the Staggers Act. H.R. Rep. No. 96-1430, *supra* at 80.

[39] H.R. Rep. No. 96-1430, *supra* at 80; S. Rep. No. 96-470, *supra* at 17; H.R. Rep. No. 96-1035, *supra* at 38-39.

[40] The ICC is wrong in its assertion that no specific guidance is provided for the advancement of the policy set forth in Section 10101a(6) (ICC Pet. at 24). The mandates for avoidance of excessive cross-subsidization, equitable allocation of a carrier's revenue needs and other administrative guidelines set forth in, *e.g.*, 49 U.S.C. §§10704(a), 10707a(e)(1) and (2)(C), and 10709(d) were specifically written to assist the ICC in maintaining reasonable rates on captive rail traffic.

action in this case would give full effect to Congress' mandate. Cf. *S.E.C.* v. *Sloan*, 436 U.S. 103, 118-20 (1978); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 368-69 (1946).

CONCLUSION

The Petitions for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit should be denied.

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Nos. 84-884 and 84-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, *et al.*,
Respondents,

NORFOLK AND WESTERN RAILWAY COMPANY, CHESSIE SYSTEM RAILROADS, AND SEABOARD SYSTEM RAILROAD, INC.
Petitioners,

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Respondents.

On Petitions For Writs of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR RESPONDENTS COAL EXPORTERS ASSOCIATION AND NATIONAL COAL ASSOCIATION IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court of Appeals properly determined that the Interstate Commerce Commission's exemption of the rail transportation of export coal from the Interstate Commerce Act misconstrued the standards for an exemption under 49 U.S.C. §10505(a).

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Nos. 84-884 and 84-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY, CHESSIE SYSTEM RAILROADS, AND SEABOARD SYSTEM RAILROAD, INC.,
Petitioners,

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS COAL EXPORTERS ASSOCIATION AND NATIONAL COAL ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-47a) is reported at 745 F.2d 76. The opinion of the Interstate Commerce Commission (Pet. App. 50a-125a) is reported at 367 I.C.C. 570.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1984. No petition for rehearing was filed with the Court of Appeals. The petitions for a writ of certiorari were filed on December 3, 1984.[1] This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

The provisions of the Interstate Commerce Act principally involved are the exemption provision, 49 U.S.C. §10505, and the rail transportation policy, 49 U.S.C. §10101a. (App. 150a-152a). The Administrative Procedure Act, 5 U.S.C. §§551-706, is also involved, particularly section 706 regarding judicial review.

STATEMENT OF THE CASE

This case involves a decision by the Interstate Commerce Commission (ICC or Commission) to exempt the rail transportation of export coal from all regulatory requirements of the Interstate Commerce Act. Among the provisions from which rail carriers were exempted are protection for shippers against unreasonably high rates, the common carrier obligation, the commodities clause, and the prohibition against discrimination. The Commission acted pursuant to 49 U.S.C. §10505(a), which authorizes it to exempt persons or services from provisions of the Act where the Commission finds "that the application of a provision of—

> (1) is not necessary to carry out the transportation policy of section 10101a of [title 49]; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of [the Act] is not needed to protect shippers from the abuse of market power.

[1] A group of Western Railroads, parties below, did not file a petition for writ of certiorari, and have not filed a brief in support of the petitions in Nos. 84-884 and 84-885.

The Court of Appeals vacated and remanded the ICC's exemption of the rail transportation of export coal from all of the Interstate Commerce Act. Its unanimous decision held that the Commission had unlawfully interpreted the two statutory exemption tests by ignoring the protections for shippers against unreasonably high rates maintained in the Staggers Rail Act of 1980.

1. The Staggers Rail Act of 1980

The Staggers Act[2] amended the Interstate Commerce Act by modifying the criteria for determining when the ICC should have jurisdiction to hear rate challenges and when the marketplace should be relied upon to set competitive rates. While granting railroads increased rate flexibility, the authors of the Staggers Act declared it essential that continued protection from unreasonably high rates be afforded to captive shippers (*i.e.*, those without competitive transportation alternatives).

The Staggers Act was a compromise which passed with the support of the shipper community because of the assurance, built into the structure and policies of the legislation, that regulation would be maintained where marketplace competition was insufficient to protect shippers and the public from abusive practices by the railroads (Pet. App. 8a-9a and n.6, 41a-45a). As stated by Congressman Rahall, author of a key compromise amendment which enabled the legislation to pass:

> [M]y involvement in the rail legislation now before the House was to assure that a balance was struck, a balance which would allow carriers to achieve adequate revenues while providing protection for captive shippers against unjustifiably high rail rates. I believe this balance has been struck and urge support for the Conference Report.[3]

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[2] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[3] 126 Cong. Rec. H10086-87 (daily ed., Sept. 30, 1980). A bill reported by the House Committee on Energy and Commerce was rejected on the floor because of shipper opposition. 126 Cong. Rec. H6428-29 (daily ed., July 24, 1980). Thereafter, Mr. Rahall and others prepared a substitute that better accommodated shipper interests, and the House of Representatives passed this substitute. 126 Cong. Rec. H8628 (daily ed., Sept. 9, 1980).

To implement the dual objectives of rate flexibility and protection for captive shippers, Congress established a numerical jurisdictional threshhold for rate challenges.[4] Above that level, ICC protection against unreasonably high rates is to continue where the rail carrier has "market dominance" over the transportation to which the rate applies.[5] In a rate reasonableness case the "Long-Cannon Amendment" requires the ICC to consider whether any particular commodity is paying an unreasonable share of the carriers' revenues.[6]

Congress considered coal traffic to be the prime example of a commodity over which railroads possess market dominance, and cautioned that railroads should not be permitted to meet all of their revenue needs by further high rates on coal traffic.[7] The Conference Report expressed Congress' special concern for coal:

> The Conferees intend that this [rail transportation] policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.[8]

A key element of the rail transportation policy is the requirement that the ICC "maintain reasonable rates where there is an absence of effective competition. . . ." 49 U.S.C. §10101a(6). As recognized by the Court of Appeals, this policy

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[4] 49 U.S.C. §10709(d)(2). See Western Coal Traffic League v. United States, 719 F.2d 772 (*en banc*) (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2160 (1984). The jurisdictional ratio is now 1.8 times the railroad variable cost of the movement.

[5] 49 U.S.C. §10709(a),(c).

[6] 49 U.S.C. §10707a(e)(2)(C).

[7] S. Rep. No. 470, 96th Cong., 1st Sess. at 7 (1979).

[8] H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. at 80 (1980). The importance of coal to Congress is underscored by the fact that the quoted language was the only substantive comment in the Conference Report on the rail transportation policy in section 1010la.

applies to export coal as well as to domestic coal shipments (Pet. App. 35a).[9]

The exemption provision is not intended to remove protection against unreasonably high rates for the transportation of coal and other bulk commodities where there is an absence of effective competition from another railroad or other modes. The Senate Committee's provisions, which were incorporated by the Conference Committee into the bill that finally passed, "allows the Commission to exempt important areas of competitive traffic and to concentrate its resources on the problems of noncompetitive traffic where continued regulation is most needed."[10] The Senate Committee emphasized that "greater use of the exemption power should not be at the expense of captive shippers who have no reasonable transportation alternatives."[11] The Conferees stated that the ICC was "to determine where [there] can be deregulat[ion] consistent with the policies of Congress."[12] These legislative expressions are incorporated in the statutory requirement that an exemption be granted only if regulation is not necessary to carry out the rail transportation policy or protect shippers from an abuse of market power. 49 U.S.C. §10505(a).

2. The ICC's Exemption Decision

Because of a rapid expansion of U.S. exports of coal beginning in 1978 and 1979, U.S. coal shippers became increasingly concerned about the level of railroad rates from mines to ports. During this period, the Coal Exporters Association (CEA) filed several protests against rate increases on export coal.[13] On

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[9] Specific Congressional concern for export coal was expressed, *e.g.*, by Mr. Rahall. 126 Cong. Rec. H8551 (daily ed., Sept. 9, 1980).

[10] S. Rep. No. 470, 96th Cong., lst Sess. at 43 (1979).

[11] *Id.*

[12] H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. at 105 (1980).

[13] Ex Parte No. 349, Increased Freight Rates, 1978 (protest and petition for suspension filed May 30, 1978); Ex Parte No. 357, Increased Rates, 1978 (protest filed December 1, 1978); Ex Parte No. 368, Increased Rates, 1979 (protest filed July 11, 1979).

March 27, 1981, CEA filed a complaint challenging as unreasonably high virtually all of the rail rates for transporting export coal to coastal ports and certain docks on the Ohio River.[14] Evidence filed concurrently with the complaint showed that (1) 95 percent of the exporters' mines have no transportation alternative for their shipments of export coal except the single railroad serving the mine and (2) the challenged rates yielded revenues two to three times the variable costs of providing the rail service, indicating substantial market power.

Shortly after CEA challenged the export coal rates, the Norfolk and Western Railway petitioned the Commission to exempt movements of export coal via Atlantic and Gulf ports from the provisions of the Interstate Commerce Act. In September 1981 the Commission issued a notice of proposed exemption, expanding the case to cover export coal transportation via all ports nationwide.[15]

The Departments of State and Commerce, the Office of the Special Trade Representative, CEA, NCA, other export coal producers, shippers of other bulk commodities, port operators, and water carriers, and ocean-going carriers opposed the exemption. Opposition was also expressed by more than a dozen coal buyers from Europe and Japan, as well as by foreign governments. The railroad proponents of the exemption were joined only by the Department of Transportation.[16] At oral argument Senators Huddleston (Ky.), Specter (Pa.) and Hatch (Utah) appeared and argued against the exemption.

On March 3 and 4, 1983, the Commission issued press releases announcing that a 3-2 majority had voted to exempt export coal. On June 9, 1983, the Commission issued its written

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[14] Coal Exporters Ass'n, *et al.* v. Atchison, Topeka and Santa Fe Ry., *et al.*, I.C.C. Docket No. 38301S. The complaint, exhibits and verified statements attached thereto are part of the record in the ICC's exemption proceeding.

[15] Ex Parte 346 (Sub-No. 7), Notice of Proposed Exemption, 46 Fed. Reg. 44529 (September 4, 1981).

[16] The Department of Justice's comments expressed no position on the ultimate merits of the exemption.

decision exempting the rail transportation of export coal from the entire Interstate Commerce Act applicable to rail carriers (Pet. App. 50a-92a, 114a-115a). Chairman Taylor filed a dissenting opinion (Pet. App. 92a-113a).

Both the majority and the dissenters agreed that export coal originated on the lines of an eastern rail carrier is generally transported in single-line service to that carrier's export coal facility and that very few mines are served by more than one railroad (Pet. App. 61a; see 95a). The Commission majority, however, found the existence of transportation alternatives such as truck, barge and coal slurry pipeline (Pet. App. 61a-62a). Chairman Taylor responded that coal slurry pipelines do not exist. He said that truck and barge competition are unavailable for the great majority of export coal shippers and, where present, are an ineffective competitive force (Pet. App. 95a-96a).

The majority also said that coal from Appalachia, which constitutes the vast bulk of export coal, faces competition from midwestern and western U.S. sources (Pet. App. 62a-63a). Chairman Taylor countered by noting testimony by the railroads that the largest western U.S. reserves do not produce coal of export quality, and that midwestern coal has too much sulfur to compete with eastern coal in either the metallurgical or steam coal markets (Pet. App. 96a-97a).

The Commission majority also concluded that certain of the larger export coal shippers own mines on different railroads and can play one railroad off against another and thus achieve bargaining leverage (Pet. App. 61a). Chairman Taylor again noted record evidence that only a small fraction of the mines were controlled by companies with mines on more than one railroad. Even in those cases, he said, it would be rare for coal located on one railroad to be substitutable for that on another in terms of availability and conformance with the quality specifications of the particular buyer (Pet. App. 97a-98a).

The Commission never found that railroads lack market power. Consequently, its decision turned to whether statutory

protections are needed to protect shippers from an abuse of that market power. It said, "the issue is not whether deregulation will give the railroads *some* market power but whether we conclude that an exemption will result in abuse" (Pet. App. 82a, emphasis in original). To determine whether the "abuse of market power" requirement was satisfied, the Commission first inquired whether world competition for coal places a "cap" on the delivered price of U.S. coal to foreign buyers and thereby restrains American rail carriers' rates.[17] This cap, the Commission maintained, would deter railroads from raising their rates for fear of pricing U.S. coal out of foreign markets and losing the attendant export coal transportation business. However, it recognized that the world cap does not answer how the railroad and coal shipper would divide the profits above railroad and shipper costs within that price ceiling (Pet. App. 67a).

It, therefore, proceeded to the second part of the test for satisfaction of the "abuse of market power" statutory prerequisite—whether railroads having market power over export coal shippers would appropriate all of the rents. The ICC set forth its interpretation of the test as follows (Pet. App. 83a, emphasis added):

> This fact [the world market's restraint on rail rates] means that the issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

The Commission predicted that the railroads would indeed appropriate the available rents above shipper costs:

> Exemption will free the railroads to maximize their revenues by pricing on the basis of market demand and each mine's long run marginal cost (including a return on cost of capital).

(Pet. App. 75a).

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[17] Chairman Taylor disagreed that a world price cap would protect export coal shippers from unreasonable rail rates (Pet. App. 94a, 95a).

The ICC adopted the legal standard that abuse of market power would not occur unless the railroads set their rates so high that they priced the traffic out of the market or rendered coal production unprofitable in a particular case. This the ICC predicted would not occur because "it would be contrary to [the] carrier's interest to attempt to abuse its market power by raising rates to the point where the traffic stops" (Pet. App. 85a).

With respect to the remaining statutory test under the exemption provision—the consistency of the exemption with the rail transportation policy of 49 U.S.C. §10101a, the Commission determined (Pet. App. 73a, emphasis added) that "[c]ontinued regulation of export coal traffic is not necessary to carry out *any* of the 15 elements of the rail transportation policy . . . " Its discussion of these policies, however, mentioned paragraph (6)—the maintenance of reasonable rates where there is an absence of effective competition—only once, and then in a footnote that implied it was not applicable to export coal (Pet. App. 71a, n. 32). Although the ICC stated at several points that post-exemption rates would be "reasonable" and "rational" (Pet. App. 75a, 77a), it did not explain what these terms mean or state what standard it had applied to reach this conclusion.

3. The Court of Appeals' Decision

The Court of Appeals vacated and remanded the exemption decision, holding that the ICC's conclusions about the prerequisites for an exemption were an unreasonable interpretation of the statute (Pet. App. 5a).[18] It said that the two findings required by section 10505(a) are "particularly intertwined in this case," and that the policy in section 1010la(6) "substantially overlaps with the provision relating to 'protect[ing] shippers from the abuse of market power'" (*Id.*).

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[18] The Court did not reach several challenges to the ICC decision, including its failure to comply with procedural requirements of the Administrative Procedure Act (Pet. App. 5a-6a, n.4), and the absence of record evidence to support an exemption from the commodities clause, anti-discrimination provisions and other non-maximum rate sections of the Act.

The Court began its opinion by describing two interrelated challenges to the ICC decision: that the decision was arbitrary and capricious; and that the ICC's interpretation of its exemption authority is unreasonable. The Court's analysis turned more on the latter contention, though it said the two arguments are "closely interrelated" (Pet. App. 7a).

It then presented a general overview of the Staggers Rail Act. This, it said, is not "a simple deregulation of the railroad industry" (Pet. App. 8a). Rather, it is a compromise, the underlying approach of which was

> to move toward much greater reliance on market forces rather than regulation to govern rail carriage, but to temper that move with a policy of retaining regulation where the market would be insufficient to protect shippers and the public from abusive railroad practices.

(Pet. App. 9a). The Court chronicled the numerous descriptions of the Act by conference committee members, sponsors, leading proponents and floor leaders "as a detailed and delicate compromise . . . reducing or eliminating regulation where appropriate and preserving regulatory protection for shippers where necessary" (*Id.* at n.6).

The Court described the purpose of the exemption provision as being "to evaluate on a continuing basis the specific need for the various aspects of the regulatory scheme in particular contexts," and said it gave the ICC very broad authority to eliminate unnecessary regulation. However, it said, the legislative history and the statute make "conditional" the exercise of exemption authority by the ICC (Pet. App. 10a).[19]

After presenting first the views of the ICC majority and then ICC Chairman Taylor's dissenting opinion about rail transportation and the export coal industry (Pet. App. lla-26a), the

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[19] The Court said Congress' delegation of the exemption authority "included guidelines that conditioned the authority so as to preserve the policy balance in the Act." It cited the Conference Report's specification that the ICC's task is "to determine whether [there] can be deregulat[ion] consistent with the policies of Congress" (Pet. App. 10a, 11a).

Court addressed the ICC's predictions of post-exemption railroad behavior and the agency's analysis of the exemption provision's legal standards (Pet. App. 26a-47a). It declared that the limits placed by the statute on the exemption power are satisfied with a "proper finding of an absence of 'market power' and the presence of 'effective competition,' " pointing out that it may make a determination that regulation is "not needed to protect shippers from an abuse of market power", even if there is no effective competition (Pet. App. 28a). However, it said the exemption decision was not premised on either, and that no such finding had been made (Pet. App. 28a, 31a, 35a). Rather, the Court said, the ICC's discussion of how the railroads are likely to behave in an unregulated environment rested on the premise that unregulated railroads would be able and willing to price discriminate among export coal shippers. This, the Court said, citing several antitrust authorities, "clearly assumes some significant degree of railroad monopoly power" (Pet. App. 29a).

With respect to the required statutory finding of consistency with the rail transportation policy, the Court complained that the ICC's analysis had "hardly mentioned the provision of the policy most clearly related to petitioners' claims," the direction in section 10101a(6) " 'to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital" (Pet. App. 34a-35a). The Court read the policy of section 10101a(6) as not only an independent condition on the exemption power through section 10505(a)(1), but also as closely intertwined with the "abuse of market power' " requirement in section 10505(a)(2). It held the ICC's interpretation of section 10101a(6) as allowing an indifference to the division of rents between railroads and shippers to be contrary to the statute's concerns about unreasonable rates and excessive profits (Pet. App. 44a).

The Court then considered the Commission's interpretation of whether regulation is necessary "to protect shippers from an abuse of market power." It noted that the Commission had based

its interpretation on two tests. The first was whether worldwide competition for coal would prevent American rail carriers from unilaterally raising the delivered price for coal to be purchased by foreign users. The second was whether, within this cap, the railroads would be able to appropriate all of the rents (Pet. App. 37a, quoting ICC decision at Pet. App. 83a). The Court said that "[t]hese two elements become, for the Commission, the standard under which it evaluates whether or not an exemption will result in an abuse of market power. In other words, so long as coal shippers are not forced to reduce production . . . and so long as they are not wholly excluded from any economic rents above that level, their rate is 'reasonable' and there is no 'abuse of market power' " (Pet. App. 37a).

The Court concluded that the Commission's standard was an unreasonable construction of the Staggers Act's accommodation between carrier and shipper interests. It said that the ICC's interpretation of the statutory exemption tests "is not one that Congress would have sanctioned" (Pet. App. 40a, quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 Ct. 2778, 2782 (1984)).[20] The Court declared that, except for its discussion of a standard which misinterpreted the Staggers Act, the Commission "never attempted to explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and non-abuse of market power" (Pet. App. 46a).

4. Petitions for Writs of Certiorari

By a 4-3 vote the Commission decided to pursue further judicial review of the Court's decision. Rather than seeking a

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[20] The Court repeatedly emphasized that its decision was based on the inadequacy and unreasonableness of the Commission's standard (Pet. App. 37a, 39a, 44a, 47a). It did not make specific determinations about the Commission's conclusions on geographic, intramodal and intermodal competition. Instead, it rejected the Commission's position that these competitive factors justify the exemption because (i) the legal importance that the Commission attributed to them is not clear; and (ii) these factors played a "minimal role" within the legal standard used by the Commission (Pet. App. 45a).

rehearing or *en banc* review, the Commission petitioned for a writ of certiorari in No. 84-884. The Norfolk & Western Railway, the Chessie System Railroads, and the Seaboard System Railroad filed a joint petition in No. 84-885. The United States filed a brief in support of issuance of the writs.

REASONS FOR DENYING THE WRITS

This case meets none of the criteria for review. There is no conflict between the Court of Appeals' decision and that of any other circuit interpreting the exemption provision. The case involves but a single provision of the Interstate Commerce Act and thus presents a "unique question of statutory construction" which does not have precedential significance for other statutes. *Watt v. Alaska*, 451 U.S. 259, 274 (1981) (Stevens, J., concurring).

The arguments advanced in support of review are based on a misreading of the Court of Appeals' opinion and the Commission's decision. The United States erroneously contends that the Commission did not articulate a standard interpreting "abuse of market power" and that the lower court therefore wrongly rejected the standard it attributed to the Commission. Review of the agency's decision shows that the ICC did present a standard, albeit an incorrect one. Moreover, the single "Question Presented" by the United States—whether the Court erroneously required the ICC to engage in a detailed analysis of the reasonableness of post-exemption rates—is not raised by the lower court's decision. The decision in fact requires no such analysis. Rather, the Court correctly vacated and remanded the ICC's exemption decision because the legal standard the ICC applied is contrary to the statute.

The predictions by the proponents of review that the exemption provision will be crippled if the Court of Appeals' decision stands are, therefore, incorrect. The provision will continue to be viable when the Commission applies it properly, as it has many times in the past. The Court of Appeals' decision correctly points

the way for the Commission to carry out the mandate of the Staggers Act to strike a balance between rate flexibility for carriers and protection of captive shippers.

Finally, this is a poor case for review because the ICC's decision contains numerous critical factual errors. It was attacked below as being arbitrary and capricious, as well as "not in accordance with law." 5 U.S.C. §706(2)(A). The Court treated the arbitrariness challenge as "interrelated" with the challenge to the ICC's interpretation of the exemption section, upon which it based its ruling.

a. The United States contends (Brief, 15-16, 18) that the Commission did not articulate a standard for the exercise of the exemption authority and that the Court of Appeals wrongly attributed a standard to the Commission, which it then rejected. Even if accurate, the argument that a court erred clearly is not an issue worthy of Supreme Court review. But, here, the premise is wrong. Contrary to the reading by the United States, the Commission did interpret the "abuse of market power" requirement.[21] After discussing the significance of world-wide competition for export coal, the Commission presented its standard (Pet. App. 83a):

> . . . [T]he issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

The Court rejected this test as an unreasonable interpretation of the statutory prerequisite for an exemption: that regulation is not needed "to protect shippers from the abuse of market power", as

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[21] The ICC's petition (at 17) describes the Commission's test as whether post-exemption rates would be reasonable, and acknowledges (at 17, 18) that "the question of the current rates' reasonableness is currently before the Commission." See Coal Exporters Ass'n, *et al.* v. Atchison, Topeka & Santa Fe, *et al.*, ICC Docket 38301S.

well as the requirement of consistency with the rail transportation policy.

b. The predictions by petitioners and the United States about the dire effects of the Court of Appeals' decision do not withstand scrutiny. They warn that the decision requires the ICC to make "individualized, detailed findings" in exemption cases similar to those in rate reasonableness cases and will ban broad exemptions. As a result, they argue, use of the exemption provision will be "crippled."[22]

These characterizations of the decision and predictions find no support in the Court of Appeals' decision. It does not, in fact, require "individualized, detailed findings," and there is no basis for inferring that it does. Rather, the Court repeatedly made clear that its decision requires the ICC to establish standards that are not unreasonably incompatible with Congress' purpose in placing the the rail transportation policies, the market dominance provision, and the maximum rate provisions in the Staggers Act.[23] Moreover, as the brief of the United States documents, the Commission has authorized broad exemptions from regulation for various commodities,[24] and the courts have sustained exemptions for all transportation in "piggyback"

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[22] Each of the proponents for review makes this point with varying degrees of urgency. The Commission's petition (at 11) claims that the decision "will effectively preclude the ICC from any significant use of the exemption power. . . " The railroads allege (at 21) that the decision "effectively nullifies Congress" intent in enacting the exemption provision to authorize broad exemptions from regulation." The United States (at 14) argues that the decision "would make it virtually impossible for the Commission to implement the provision in the manner Congress intended."

[23] Pet. App. 37a, 39a, 47a. Hence, the brief of the United States incorrectly describes the "Question Presented" as whether the Commission was required to engage in a detailed analysis of various factors. The two petitions set forth similar "Questions Presented".

[24] For example, it has exempted fresh fruits and vegetables, other major agricultural commodities, and frozen foods, and has removed all regulation under the "long and short haul provisions" of 49 U.S.C. 10726. See 49 C.F.R. §§1039.10, *et seq.* (1984).

equipment,[25] the exemption of boxcar traffic from maximum rate regulation,[26] and the exemption of states and their contract operators from the labor protective provisions of the Interstate Commerce Act.[27]

The correct view of the vitality of the exemption provision is that of ICC Chairman Taylor. In voting against pursuing further review of the Court of Appeals' decision, he stated that the remand "will have no adverse precedential impact and . . . will not impede our continued use of the Staggers Act exemption provision to properly deregulate the railroad industry."[28]

c. The Court of Appeals' decision correctly carries out the Congressional purpose in enacting the Staggers Act as a whole and especially the exemption provision. According to ICC Chairman Taylor, the decision "merely reaffirmed the mandate from Congress, as set forth in the Staggers Act, that we consider and balance all relevant competing interests in determining whether an exemption falls within the ambit of the National Transportation Policy."[29]

The Staggers Rail Act of 1980 is a regulatory reform act, maintaining regulation in specified instances (Pet. App. 9a). Several efforts to remove virtually all regulatory provisions applicable to rail transportation failed during the 96th Congress.[30] A

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[25] American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981).

[26] Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984), petitions for cert. pending on other issues, Nos. 84-550,-867.

[27] Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

[28] Notation vote memorandum to the Commission from Chairman Taylor, Oct. 10, 1984, attached to Oppositions to Motions for Stay of Issuance of Mandate Pending Petition for Writ of Certiorari, Coal Exports Ass'n, *et al.* v. ICC (D.C. Cir., No. 83-1629, filed Oct. 29, 1984).

[29] *Id.*

[30] During the first session of the 96th Congress, the Senate Commerce Committee rejected S.796, which would have completely deregulated rail transportation five years after enactment, and introduced a new bill, S.1946, which the Senate subsequently passed. 126 Cong. Rec. S3312 (daily ed., April 1, 1980). The House adopted the "Eckhardt-Rahall Amendment,"

principal cause of their failure was that they proposed to eliminate what Congress concluded are the legitimate rights of captive shippers to regulatory protection against high rail rates. Foremost was Congress' concern and direction that shippers of coal—which are naturally dependent on rail transportation—not be left vulnerable to unreasonably high rates.[31] After a protracted legislative debate, Congress adopted a compromise that moved toward greater reliance on market forces, but (as the Court of Appeals stated) tempered "that move with a policy of retaining regulation where the market would be insufficient to protect shippers and the public from abusive railroad practices" (Pet. App. 9a).

The Court of Appeals correctly pointed out that the Staggers Act's "record and legislation is filled with references to these concerns both as the reasons for deregulation and *as the limits of deregulation*" (Pet. App. 4la, emphasis in original).[32] It recognized that the exemption section is not, as the Commission's decision would make it, a carte blanche for the ICC to undo Congress' compromise. Section 10505 does not authorize the Commission to circumvent Congress' statutory provisions maintaining regulatory recourse against unreasonable rates for coal

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defeating the bill reported by the House Interstate and Foreign Commerce Committee. The bill ultimately passed by the House was far different from that reported by the House Committee. See note 3, *supra*.

[31] The Conference Report conveyed Congress' will that the rail transportation policy be particularly applied to prevent rates for coal from being unreasonably high:

> The Conferees intend that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.

H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. at 80 (1980).

[32] Also, it comports with the Supreme Court's admonition in remanding another agency's decision to deregulate that "the forces of change do not always or necessarily point in the direction of deregulation." Motor Vehicle Mftrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S.Ct. 2856 (1983).

shippers subject to rail market power. The Court properly required that section 10505 be read consistently with these shipper protections, relying on the language of section 10505 as well as the structure and purpose of the entire Act.[33] While it noted that Congress intended the exemption provision to be one "cornerstone" of the Staggers Act, it correctly refused to equate that expression with unlimited agency authority that would dismantle the Act's foundation of a balance of the twin goals of rate flexibility and captive shipper protection.[34]

The parties supporting issuance of a writ characterize the exemption provision as mandating the Commission to experiment with deregulation. In support they cite the ICC's authority in section 10505(d) to revoke an exemption and legislative history, including selected words in the section-by-section analysis in the Conference Report. Petitioners and the Commission's decision, however, fail to accept the conditional nature of section 10505(a), and the incompatibility of their position with the statute and Gongressional purpose that repeatedly emphasizes

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[33] Every court of appeals that has reviewed a decision under section 10505 has carefully analyzed Congress' intent about the maintenance of particular regulatory protections. *See, e.g.*, American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

[34] The brief of the United States argues that the Court misunderstood the nature of the exemption authority. The brief incorrectly states (at 13) that "Congress intended the *exemption authority* to reflect a 'totally new approach to the railroad industry'" and ascribes that statement to Representative Staggers. However, the quoted portions of Mr. Staggers' statement are directed at the entire conference bill, not the exemption section. 126 Cong. Rec. H10084, 10085 (daily ed., Sept 30, 1980). With respect to the exemption section, he said it "has been carefully drafted to limit regulation to the bare essentials necessary to protect against abuses of market power." *Id.*

In addition, the references to the report of the House Interstate and Foreign Commerce Committee are inapposite because that Committee's bill was rejected on the House floor, and it was the Senate Committee's exemption provisions that the conferees accepted in the final bill. Its report (*infra* note 35), therefore, is entitled to greater weight than the House Committee Report. *See* Crown Central Petroleum Corp. v. Federal Energy Administration, 415 F. Supp. 60, 62 (D.D.C.), *aff'd*, 542 F.2d 69 (T.E.C.A. 1976).

those elements of the statute that protect shippers against unreasonable rates.

The Court's insistence that the Commission's decision turn on the articulation of a lawful "abuse of market power" standard is well-supported by that section's legislative history. The Senate Committee Report states that the purpose of the language in section 10505(a)(2), to "protect shippers from an abuse of market power," is

> to reemphasize the Committee's concern that greater use of the exemption power should not be at the expense of captive shippers who have no reasonable transportation alternatives.[35]

The Conference Report stresses that the exemption provision is to be used only to examine "specific regulatory provisions and practices not yet addressed by Congress to determine whether they can be deregulated consistent with the policies of Congress."[36] The Court of Appeals corrected the ICC's erroneous use of the exemption section to remove the very statutory provisions that Congress, after many months of deliberation, voted to maintain for captive shippers of coal and other bulk commodities.

d. The Court of Appeals' decision is in accord with precedent. The Court followed *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984), which held that a court should not defer to an agency decision where "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 2783, *quoting United States* v. *Shimer*, 367 U.S. 374, 383 (1961). "[T]he courts are the final authorities on issues of statutory construction," and their deference to an agency's interpretation "cannot be allowed to slip into a judicial inertia" or "rubber-stamp[ing]" of agency decisions inconsistent with a statutory mandate or congressional policy. *Volkswagenwerk A.G. v.*

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[35] S. Rep. No. 470, 96th Cong., lst Sess. at 43 (1979).

[36] H.R. Conf. Rep. 1430, *supra*, at 105.

FMC, 390 U.S. 261, 272 (1968). Petitioners' argument that the Court of Appeals impermissibly substituted its judgment for the Commission's is not valid.

The ICC standard here is comparable to an oil pipeline rate standard promulgated by the Federal Energy Regulatory Commission (FERC) and recently vacated in the *Farmers Union* case because it contravened the statutory directive to determine whether rates are "just and reasonable".[37] *Farmers Union* held that Congress intended the FERC's rate regulation rules to do more than merely prevent "grossly abusive rates".[38] The United States opposed Supreme Court review, arguing, that the Court of Appeals had correctly relied on legislative history to reject FERC's interpretation of the statute.[39]

The similarities of the statutory requirements and of their misinterpretation by the respective agencies in *Farmers Union* and this case are manifest. Like the "just and reasonable" standard for oil pipeline rates, the exemption provision for railroads requires the maintenance of regulation where necessary to protect shippers from an abuse of market power. Both agency decisions contain standards not reconcilable with these legislative commands, and were correctly set aside.

e. Factually, this is a poor case for Supreme Court review. To support its decision, the ICC majority presented a collection of speculation, unsupported assertions, and anecdotal evidence, which were vigorously contested by shippers and in the dissent. As Chairman Taylor said, the majority's factual account amounted to a "summarization of the proponent railroads' comments . . . ." (Pet. App. 92a). Although the Court did not rest its decision on whether the majority's determinations were arbitrary

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[37] Farmers Union Cent. Exchange v. FERC, 735 F.2d 1486 (D.C. Cir.), *cert. denied*, 105 S.Ct. 507 (1984).

[38] *Id.* at 1504.

[39] Brief of United States in Williams Pipe Line Co. v. Farmers Union Cent. Exchange, Inc., Nos. 84-184,-185 and-186 (at 17).

and capricious, it treated the arbitrariness challenge as "closely interrelated" with the basis of its ruling (Pet. App. 7a, 45a-46a).

Among the key elements of the Commission's decision which are plainly wrong are, first, its ruling that section 10101a(6) and the Conference Report's instruction to maintain reasonable rates for coal do not apply to export coal (Pet. App. 71a). The Court correctly observed that the provisions apply. (Pet. App. 35a). For its conclusion that historically regulation had not been needed to restrain rates for export coal, the ICC asserted that shippers had not complained about rate levels. However, the Commission's records contain three protests filed by the Coal Exporters Association in the 1970's, plus that party's pending complaint against all export coal rates, which was filed prior to institution of the exemption proceeding (Pet. App. 25a). To support its finding of effective competition from other forms of transportation, the Commission cited coal slurry pipelines, even though there are none (Pet. App. 77a, n.42; *cf.*, Pet. App. 95a). It pointed to effective truck competition when all parties, as the Court noted, agreed that the statistic cited by the majority was invalid (Pet. App. 22a, n.13). Because of these and other arbitrary and capricious determinations, the ICC's decision would be invalid, even if the Court's ruling on the unlawfulness of the ICC's interpretation of the Act's legal standards were modified.

f. There is no direct conflict among the circuits. This is the first case in which the courts have been called to review an ICC decision removing maximum rate regulation for traffic subject to significant railroad market power.

Nor is there a conflict in principle. The decision below is consistent with the other appellate decisions reviewing exemptions under section 10505. Like this case, each has turned on a searching analysis of Congressional intent about the specific subject of the exemption so that a proper evaluation can be made as to whether maintenance of regulation is necessary "to carry out the transportation policy." Where the exemption is consistent

with Congress' intent, the ICC has been sustained; when in conflict, it has, as here, been reversed.[40]

American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981), is the only decision under section 10505 decided by another circuit.[41] There the court sustained the exemption of intermodal rail-truck traffic, in large part, because the Staggers Act addressed the desirability of deregulating this traffic. However, it reversed the inclusion of the Alaska Railroad in the exemption because that conflicted with the rail transportation policy most relevant to that case. 656 F.2d at 1120, 1128.[42]

Petitioners N&W *et al.* incorrectly assert (at 23) that the Court of Appeals' decision conflicts with *American Trucking*

[40] Three other decisions under section 10505 have been reviewed by a court of appeals. McGinness v. ICC, 662 F.2d 853 (D.C. Cir. 1981) (exemption remanded for modification); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (exemption upheld); Brae Corp. v. United States, *supra* (exemption upheld in part; vacated in part). These cases stand for the proposition followed in the present case that the Commission may not exercise its exemption power where doing so would be inconsistent with Congressional intent regarding the maintenance of particular statutory protections.

[41] Brae Corp. v. United States, *supra*, of course, cannot be the basis for a conflict between circuits. No party asked for a rehearing or *en banc* consideration of any perceived conflict between *Brae* and the current case. Nonetheless, the railroads' petition (at 24) argues that this case conflicts with the Court's affirmance in *Brae* of the removal of maximum rate regulation for box car traffic, while the Commission's (at 11, 12) considers the rejection of the exemption of joint rates to be similar to the present case. Part of the box car exemption was reversed in *Brae* because the ICC committed the same transgression there as it did in the export coal case: it failed to take into account the critical rail transportation policies. 740 F.2d at 1050. That part of the *Brae* decision upholding the ICC's removal of maximum rate regulation for box cars was based on facts not present in the export coal exemption decision—extensive studies showing that the post-exemption rates for box car traffic would not be high enough to subject them to ICC maximum rate jurisdiction, much less be unreasonable. 740 F.2d at 1037, 1040-1042.

[42] The Fifth Circuit applied the "arbitrary and capricious" test in *American Trucking Ass'ns*. The D.C. Circuit did not reach that question in the instant case, finding that the ICC's legal standards are unlawful.

Ass'ns because the former requires for an exemption a finding of either "effective competition" or that post-exemption rail rates would be reasonable, but *American Trucking Ass'ns* does not. However, in *American Trucking Ass'ns*, the ICC specifically found "effective competition" on the basis of the railroads' loss of market share to trucking. Since there was effective competition, neither the ICC nor the Fifth Circuit reached the question whether post-exemption rates would be reasonable. 656 F.2d at 1125, 1126. In the instant case the ICC made no "effective competition" determination, and, instead, wrongly interpreted and addressed the statutory tests whether world competition for coal constrains rail rates for export coal and whether the railroads would be able to appropriate all of the economic rents.[43]

The petitions are not strengthened by the United States' argument (Brief, 14) that review should be granted because this is a decision by the District of Columbia Circuit, which has jurisdiction over ICC decisions.[44] That circuit's jurisdiction is not exclusive. *See American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir. 1981); *Western Coal Traffic League v. United States*, 719 F.2d 772 (*en banc*)(5th Cir. 1983), *cert. denied*, 104 S.Ct. 2160 (1984). Nor has the D.C. Circuit a record of reversing exemptions or other ICC decisions under the Staggers Act. It affirmed the exemption of states and contract operators from the labor protective provisions of the Act,[45] and box car

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[43] The railroads incorrectly argue that the lower court set the ICC's decision aside because the Commission had not found the railroads have "zero market power" (N&W Pet., i). Rather, it was because the Commission made no finding that the railroads face "effective competition" (Pet. App. 35a) that the Court reviewed whether the carriers would abuse their market power.

[44] Nor are the requests for review advanced by the observation (N&W Pet., 17) that the Supreme Court has not yet construed a single provision of the Staggers Act. That the Court has not yet resolved any question regarding the Act as a whole has never been recognized as a basis for the grant of certiorari. Here, the "newness of the statutory scheme" and the lack of guidance provided by the agency in its decision (see Pet. App. 40a) further argue against granting the writ.

[45] Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

traffic from the maximum rate sections.[46] The same court upheld the ICC's rules governing minimum rail rates, a maximum rate decision favorable to the railroad, rules for calculating allowable inflation increases, and the ICC's approach to implementing the "Long-Cannon Amendment" to the Staggers Act.[47]

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[46] Brae Corp. v. United States, *supra*.

[47] Water Transport Ass'n v. ICC, 684 F.2d 81 (D.C. Cir. 1982); Potomac Electric Power Co. v. ICC, 744 F.2d 185 (D.C. Cir. 1984); Western Coal Traffic League v. ICC, 677 F.2d 915 (D.C. Cir.), *cert. denied*, 459 U.S. 1086 (1982); Arkansas Power & Light Co. v. ICC, 725 F.2d 716 (D.C. Cir. 1984).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respondents Nippon Steel Corp., Nippon Kokan K.K., Sumitomo Metal Industries, Ltd., Kawasaki Steel Corp., Kobe Steel Ltd., and Nisshin Steel Co. support this brief. Respondent Patrick W. Simmons, Illinois Legislative Director for the United Transportation Union, has authorized the representation that he opposes the grant of writs of certiorari for reasons set forth in this brief.

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No. 84-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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SEABOARD SYSTEM RAILROAD, INC.,
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v.

COAL EXPORTERS ASSOCIATION OF THE
UNITED STATES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS NORFOLK AND WESTERN RAILWAY COMPANY, CHESSIE SYSTEM RAILROADS AND SEABOARD SYSTEM RAILROAD, INC. IN SUPPORT

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Petitioners Norfolk and Western Railway Company, Chessie System Railroads and Seaboard System Railroad, Inc. submit this reply to the briefs in opposition filed by Respondents Coal Exporters Association of the United States, Inc. and National Coal Association ("CEA/NCA"), and by Eastern Coal Transportation Conference and Coastal States Energy Company ("ECTC").

(1) This case presents a substantial federal question—indeed a question of extraordinary significance—because

the Court of Appeals rejected, as a matter of law, the fundamental premise of railroad deregulation in particular and economic deregulation in general. Respondents argue that the Court of Appeals followed the intent of Congress in construing the exemption provision of the Staggers Act, the landmark railroad deregulation statute. 49 U.S.C. § 10505. *See* CEA/NCA Brief at 16-19; ECTC Brief at 14-17. This is plainly—and profoundly—wrong. This Court has not yet construed the Staggers Act and it should do so now to give effect to the deregulatory intent of Congress.

The fundamental premise underlying the Staggers Act and its exemption provision is that the *structure of the market* for surface freight transportation has changed. In 1887, when the Interstate Commerce Act was enacted, railroads were natural monopolies and held excessive market power because they faced no effective competition from other modes of transportation. Congress concluded that detailed, *prospective* rate regulation by the Interstate Commerce Commission (the "Commission") was necessary to protect shippers, consumers and other affected parties.[1]

In 1976, with the passage of the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976), and in 1980, with the passage of the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress found that the market structure for surface freight transportation had shifted dramatically and to the detriment of the railroads.[2] Rather than relying on the Com-

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[1] *See, e.g.*, T. Moore, "Deregulating Surface Freight Transportation," in *Promoting Competition in Regulated Markets* 77 (A. Phillips ed. 1975); S. Rep. No. 499, 94th Cong., 1st Sess. 10-11 (1975).

[2] In its legislative findings incorporated in the Staggers Act, Congress determined that although the enactment of the Interstate Commerce Act in 1887 had been necessary to prevent abuse of monopoly power by railroads, "today, *most* transportation within the United States [including rail transportation] is competitive,"

mission's elaborate, prospective rate regulation to protect the public interest, Congress sought "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and to "minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. §§ 10101a(1), 10101a(2).

In the words of Representative Staggers, the 1980 Act, and the exemption provision which it amended, embodied a "totally new approach to the railroad industry" in which "competitive factors [would] be of paramount importance." 126 Cong. Rec. 28431 (1980). Congress clearly wanted the Commission to use its exemption authority aggressively to eliminate the elaborate agency line-drawing as to the "reasonableness" of rates which characterized the previous regime of prospective rate regulation. As stated in the Staggers Act Conference Report,

> The policy underlying this [exemption] provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining *specific regulatory provisions and practices not yet addressed by Congress* to determine where they can be deregulated consistent with the policies of this Act. H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (emphasis supplied).

Moreover, the conferees anticipated that the Commission would

> eventually reduce its exercise of authority to instances where regulation is [(a)] necessary to protect against *abuses of market power* [and (b)]

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and that existing federal regulations affecting railroads "have become unnecessary and inefficient." Pub. L. No. 96-448, § 2, 94 Stat. 1896 (1980) (emphasis supplied) (reprinted in Historical Notes following 49 U.S.C.A. § 10101a).

> where other federal remedies are inadequate for this purpose. *Id.* (emphasis supplied).

With respect to such remedies, the conferees stated

> Particularly, the conferees expect that *as many as possible* of the Commission's restrictions on changes in prices and services by rail carriers will be removed *and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power. Id.* (emphasis supplied).

When the Commission found such abuses, it had the power to revoke the exemption immediately, without notice and comment procedures. 49 U.S.C. § 10505(d); H.R. Conf. Rep. No. 1430, *supra*, at 104.

In sum, where the market characteristics for a particular rail service warrant it, the exemption provision authorizes the Commission to shift from a comprehensive regime of prospective rate regulation to deregulated arrangements which can be policed *after the fact* by the Commission on a case-by-case basis. Even where the affected carriers possess market power and there is an absence of "effective competition," Congress still declared it appropriate for the Commission to grant an exemption for a particular rail service so long as continued regulation is not necessary either to carry out the national rail transportation policy found in 49 U.S.C. § 10101a, or to protect shippers from "the abuse of market power," 49 U.S.C. § 10505(a).[3]

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[3] CEA/NCA thus completely misconstrue the exemption provision when they assert that a finding of "effective competition" or lack of market power is a necesssary prerequisite to an exemption from regulation. CEA/NCA Brief at 5, 23. As the Conference Report explicitly states, and as the Court of Appeals below conceded (App. 28a), the statute "permits exemptions wherever regulation is not needed to prevent abuses of market power, *regardless of the presence of effective competition.*" H.R. Conf. Rep. No. 1430, *supra*, at 105 (emphasis supplied).

In this case, the Commission clearly complied with the express requirements of the exemption provision, as well as the intent of Congress. It first found that seven of the fifteen elements of national rail transportation policy were advanced by an exemption for export coal transportation and that continued regulation was not necessary to implement the other eight policies. (App. 73a-88a). More importantly, it also found that the continued regulation of export coal was *not* needed to protect shippers prospectively from abuses of market power primarily because of the *characteristics of the market*, which was shaped by the international forces governing the export of U.S. coal and also by geographic, intermodal and intramodal competition within the United States. (App. 52a, 56a, 63a-64a, 84a-85a).

As a result, in its crucial finding, the Commission found that carriers and shippers have "relatively equal bargaining power" and that competition and pressures of supply and demand "will establish reasonable and rational rates for this traffic." (App. 74a-75a). Given this relatively equal bargaining power between carriers and shippers, prospective line drawing by the Commission as to reasonable rates for rail shipments of coal intended for export was no longer necessary. Accordingly, the Commission concluded that it was pointless to impose the economic burden of rate regulation on export coal traffic. After the fact review of any individual claims of abuse would adequately protect shippers. (App. 87a).

The Court of Appeals *accepted*, as a matter of fact, the Commission's crucial finding that the market for export coal transportation is characterized by relatively equal bargaining power between carriers and shippers. Nonetheless, it held that, as a *matter of law*, the Commission could not base an exemption on an analysis of market characteristics alone. Whereas the Commission found that the relatively equal bargaining power of the present export coal market structure would presumptively

yield reasonable rates in the future and any individual abuses could be remedied after the fact, the Court of Appeals demanded that the Commission go further and establish a clear nexus between existing market structure and a detailed prospective definition and prediction of "reasonable rates" which shippers would pay in the future. (App. 47a).[4] Only when the Commission had defined prospective "reasonable" rates with specificity and demonstrated in advance that such rates would result from present market structure could the Commission grant an exemption under the holding of the Court of Appeals. (App. 47a). Remarkably, the court never even discussed the Commission's authority to revoke the exemption after the fact in any individual instances when an abuse was shown, although the Commission had relied on this authority in concluding that continued regulation was unnecessary. (App. 87a).

In short, by refusing to allow an exemption based on an analysis of market characteristics alone, the Court of Appeals now requires the Commission *before* granting any exemption to engage in precisely the elaborate, prospective regulatory line-drawing as to "rate reasonableness" that the exemption provision had expressly been enacted to eliminate. Accordingly, this holding presents a substantial federal question because, if allowed to stand, it will vitiate "an important cornerstone" provision of the Staggers Act, a law which marked an historic change in the regulatory role of the Commission. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980).

(2) Respondents' attempts to downplay or excuse the errors in the Court of Appeals' decision are seriously

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[4] Respondents deny that the Court of Appeals' decision can be read to impose on the Commission a duty to make detailed predictive findings concerning the reasonableness of specific rates under an exemption. CEA/NCA Brief at 15; ECTC Brief at 18. Respondents' interpretation finds no support at all in the court's opinion (*see* App. 44a-47a), as recognized by the Solicitor General in his brief in this case. *See* Brief for United States at 12, 23-24.

flawed for several related reasons. First, and most important, Respondents completely ignore the Commission's critical finding that railroads and shippers of export coal have "relatively equal bargaining power" (App. 74a)—a finding that, like the Commission's other factual findings, the Court of Appeals declined to disturb. (App. 27a, 45a).[5] This finding, based on the extensive evidence of competitive restraints on railroad pricing actions, was the essential predicate for the Commission's ultimate conclusion that, when the exemption was in effect, the railroads would not be able to abuse any market power they might have, and that "market competition and natural forces of supply and demand, without interference from this regulatory agency, will establish reasonable and rational rates for this traffic." (App. 74a-75a). Respondents' opposition thus proceeds from a flatly incorrect view of the Commission's factual foundation for its ruling, a foundation left undisturbed by the Court of Appeals.

Ignoring the Commission's finding of relatively equal bargaining power between railroads and shippers, Respondents repeat an error committed by the court below, and assert that the Commission found that railroads would in fact possess significant market power, and that it had ruled that an exemption would be permissible even if the railroads could exercise such market power by appropriating virtually *all* of the economic rents and leaving shippers just enough revenues to cover their costs and remain in business. CEA/NCA Brief at 8-9, 14-15; ECTC Brief at 9-10, 13. *See* App. 37a. But such an interpretation is flatly erroneous. The Commission *never* found that the railroads would in fact enjoy substantial market power, or that they would or could appro-

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[5] Given the Court of Appeals' acceptance of all of the Commission's factual findings, Respondents' repeated citations to evidence that the Commission explicitly rejected, and their references to Chairman Taylor's dissenting remarks, have no legal significance in this case.

priate virtually all or even a substantial share of any available economic rents. Indeed, the Commission believed that it would be a "rare instance" in which railroads would have significant bargaining leverage over particular shippers. (App. 85a). Nor did the Commission adopt a legal standard that allows an exemption so long as total coal exports do not fall and shippers receive only a "bare minimum" of the rents. (App. 38a).[6] Rather, the Commission concluded that, in view of the existing competitive characteristics of export coal transportation, and the relatively equal bargaining power of the market participants, an exemption could be expected to result in "reasonable" rates and a fair allocation of the economic rents. Thus, Respondents, like the Court of Appeals, have grossly mischaracterized the thrust of the Commission's decision, with the result that they ignore the central finding of relatively equal bargaining power and competitive market structure.

(3) Respondents have also ignored the pertinent legislative intent and history of the Commission's exemption authority. In adopting the exemption provision in 1976 and substantially broadening its scope in 1980, Congress made clear that the provision established a strong presumption in favor of deregulation. This presumption is reflected in the command that the Commission remove "*as many as possible*" of the statutory restrictions on ratemaking and other carrier practices, and that it review railroad practices under deregulation "after the fact" to correct any unanticipated abuses of market power by railroads. H.R. Conf. Rep. No. 1430, *supra*, at 105.

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[6] Like the Court of Appeals, Respondents' error derives from a misreading of the Commission's discussion of price discrimination. The purpose of that discussion was not to show that railroads do in fact have substantial market power. Rather, the limited purpose was to show that, even *if* some railroads might have some degree of market power, they would not "abuse" such power by increasing rates to the point where total export coal production would fall, or where shippers would be forced out of the market.

Respondents do not even acknowledge this dispositive legislative history. They argue, instead, that because Congress in enacting the Staggers Act retained certain regulatory provisions governing maximum rail rates for all commodities, including coal, those provisions are inviolate and beyond the Commission's exemption power unless the Commission, *before* granting an exemption, demonstrates in detail that those statutory standards of rate reasonableness will be fully satisfied under deregulation.[7] This view, accepted by the Court of Appeals, would render the exemption provision virtually meaningless, for the declared purpose of that provision was to authorize—indeed command—the Commission to *go beyond* those areas already deregulated by Congress. By reading the regulatory standards of rate reasonableness back into the exemption provision, Respondents and the Court of Appeals have reversed the presumption in favor of deregulation and have subverted Congress's intent to authorize exemptions from regulation on the basis of an assessment of market characteristics, with "after the fact" review to correct possible abuses.[8]

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[7] CEA/NCA, for example, baldly assert that the Commission is powerless to grant exemptions from those provisions of the statute that Congress in the Staggers Act decided to retain. CEA/NCA Brief at 19. That view, of course, would prevent the Commission from granting *any* exemptions. Similarly, ECTC complains that the Commission failed to observe the standards of rate reasonableness it has developed for domestic coal traffic, thus confirming its view that the exemption provision incorporates all pre-existing regulatory standards. ECTC Brief at 13.

[8] Respondents also question the significance of the decision below because the D.C. Circuit does not have exclusive jurisdiction over appeals from Commission exemption decisions. *See, e.g.*, CEA/NCA Brief at 23. This argument overlooks the crucial point, which is that because venue is always available in the D.C. Circuit in such cases, parties seeking to overturn future exemptions from regulation will naturally bring their petitions for review in the D.C. Circuit to obtain the benefit of that court's erroneous holding in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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March 5, 1985

SUPREME COURT OF THE UNITED STATES

(1) INTERSTATE COMMERCE COMMISSION
84–884 *v.*
COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

(1) NORFOLK AND WESTERN RAILWAY COMPANY ET AL.
84–885 *v.*
COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 84–884 AND 84–885. Decided April 29, 1985

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Like *ICC* v. *Brae Corp.* and *Consolidated Rail Corp.* v. *Ahnapee & W. R. Co.*, *ante*, at ——, these cases involve implementation of the Staggers Rail Act of 1980, 49 U. S. C. § 10101 *et seq.* That Act begins with a 15-point National Rail Transportation Policy with a decidedly anti-regulatory bent. § 10101a. It goes on to provide that the Interstate Commerce Commission "shall exempt a person, class of persons, or a transaction or service" from any regulation that is not necessary to carry out the policies detailed in § 10101a or to "protect shippers from the abuse of market power." § 10505(a).

Pursuant to this provision, the ICC exempted the rail transportation of coal bound for export from all regulation under the Interstate Commerce Act. 367 I. C. C. 570 (1983). In the view of the Commission, relief from regulation would lead to improved efficiency, stronger railroads,

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and greater pricing flexibility. The resulting benefits would promote a variety of goals set out in § 10101a. In addition, continued regulation was not needed to protect against abuse of market power by the railroads. They had an interest in the shippers' success, and the competitive international coal market would prevent them from raising prices so high that producers would not be competitive abroad. In addition, as experience had shown, the shippers formed a concentrated industry with bargaining power essentially equal to that of the railroads. The Commission also noted that antitrust remedies were available should the railroads abuse what market power they had, and that the railroads were unlikely to do so even if they could because the Commission would respond by revoking the exemption.

The Court of Appeals for the District of Columbia Circuit vacated and remanded. 745 F. 2d 76 (1984). It found that the Commission had overlooked a key element of National Transportation Policy: "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." 49 U. S. C. § 10101a(6). Reading this provision in tandem with § 10505's requirement that an exemption not subject shippers to "the abuse of market power," the court held that the Commission had too narrow an understanding of the latter phrase. As it read the Commission's opinion, there would be no abuse of market power as long as the shippers had some bargaining power, however minimal, and received some share of the economic rents, however slight. The court condemned this view as "wholly unreasonable," 740 F. 2d, at 95, and indifferent to the Act's concern for protecting the revenues of shippers, *id.*, at 98.

The railroads and the ICC, supported by the United States, petition for certiorari. They argue that the decision below effectively forecloses any use of the exemption provision. While this seems an overstatement, the opinion below

does criticize the ICC for failing to quantify its conclusions with a precision that would appear unattainable. Moreover, the Court of Appeals involved itself in details of regulatory decisionmaking that might more properly be left to the agency. Precisely where hard bargaining leaves off and "abuse of market power" begins is the sort of issue best left to the agency's expertise, and the Court of Appeals' identification of abuse with any inequality is open to question.

More important, the decision below is set against the background of a fundamental clash between the Court of Appeals and the ICC concerning the deregulatory mandate of the Staggers Act. See *ICC* v. *Brae Corp.*, *ante*, at ——. The exemption provision is the key mechanism by which that mandate is to be effected, and the Commission has had some difficulty in getting its exemptions past the Court of Appeals. As I noted in dissenting from the Court's refusal to consider the *Brae* case, the effective implementation of the Staggers Act requires that the scope of the exemption requirement be settled.

I respectfully dissent.

JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.